

EDITOR'S NOTE

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85-1695-CFX
Status: GRANTED

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April 16, 1986

Title: Societe Nationale Industrielle Aerospatiale and
Societe de Construction d'Avions de Tourism,
Petitioners
V.
United States District Court for the Southern
District of Iowa, etc.

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Ford, John W.

Counsel for respondent: Lawyer, Verne, Peddicord, Roland D.

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|--|
| 1 | Apr 16 1986 | G | Petition for writ of certiorari filed. |
| 2 | May 16 1986 | | Brief of respondent U.S. Dist. Ct., So. Dist. IA in opposition filed. |
| 3 | May 20 1986 | | DISTRIBUTED. June 5, 1986 |
| 4 | May 29 1986 | X | Reply brief of petitioner Societe Nationale, etc. filed. |
| 5 | May 30 1986 | | DISTRIBUTED. June 5, 1986 |
| 6 | Jun 9 1986 | | Petition GRANTED. ***** |
| 7 | Jul 15 1986 | | Order extending time to file brief of petitioner on the merits until August 22, 1986. |
| 8 | Jul 31 1986 | | Record filed. |
| 9 | Jul 31 1986 | | Certified transcript of original record and proceedings, 2 volumes, received. |
| 10 | Aug 22 1986 | | Brief amicus curiae of Federal Republic of Germany filed. |
| 11 | Aug 21 1986 | | Brief amicus curiae of Motor Vehicle Mfrs. Assn. of US, et al. filed. |
| 12 | Aug 22 1986 | | Brief amicus curiae of Anschuetz & Co. GMBH, et al. filed. |
| 13 | Aug 22 1986 | | Brief amicus curiae of United Kingdom of Great Britain and Northern Ireland filed. |
| 14 | Aug 22 1986 | | Brief amicus curiae of Switzerland filed. |
| 15 | Aug 22 1986 | | Joint appendix filed. |
| 16 | Aug 22 1986 | | Brief of petitioners Societe Nationale, etc. filed. |
| 17 | Aug 22 1986 | | Brief amicus curiae of Republic of France filed. |
| 18 | Aug 21 1986 | | Brief amicus curiae of Italy-America Chamber of Commerce filed. |
| 19 | Aug 22 1986 | | Brief amicus curiae of United States and SEC filed. |
| 20 | Sep 2 1986 | | Order extending time to file brief of respondent on the merits until October 8, 1986. |
| 21 | Sep 5 1986 | G | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| 22 | Oct 6 1986 | | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Scalia OUT. |
| 23 | Oct 7 1986 | | Brief amicus curiae of Compania Gijonesa de Navigacion, S.A. filed. |
| 24 | Oct 8 1986 | | Brief of respondent U.S. Dist. Ct., So. Dist. IA filed. |
| 25 | Oct 28 1986 | | DISTRIBUTED. |
| 26 | Nov 14 1986 | | DEI FOR ARGUMENT. Wednesday, January 14, 1987. (1st case) |

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| Jan 14 1987 | | ARGUED. | |

85 - 1695①

Supreme Court, U.S.

FILED

APR 16 1986

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CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE and
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties in Interest)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the Hague Evidence Convention* applicable to the discovery of documentary evidence and information located abroad from a foreign national over whom a U.S. court has personal jurisdiction?
2. Where the Hague Evidence Convention applies, may a court disregard its procedures without any particularized analysis of comity considerations?

* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974).

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No. _____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE and
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties in Interest)

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Petitioners request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit¹ This case raises substantially similar issues to *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98) and *In re Messerschmitt Bolkow Blohm, GmbH*, 757 F.2d 729

¹ In response to Rule 28.1, Petitioners state the following: Petitioner Societe de Construction d'Avions de Tourism is a wholly-owned subsidiary of Petitioner Societe Nationale Industrielle Aerospatiale. Petitioners have no other affiliates or subsidiaries which are not wholly-owned.

In addition to the parties shown in the caption, Seed & Grain Construction Co. is a party in the district court proceedings. It did not participate in the writ proceedings before the Eighth Circuit.

(5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-99). Should the Court grant certiorari in either or both of those cases, it is requested that this petition be granted and the cases consolidated or, alternatively, that action on this petition be held in abeyance pending the Court's final disposition of *Anschuetz* and *Messerschmitt*.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 782 F.2d 120; the order of the magistrate (Appendix B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1986. No petition for rehearing was filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

This case concerns the construction and purpose of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974) ("Hague Evidence Convention") and the interplay between the Hague Evidence Convention, the Federal Rules of Civil Procedure, and French Penal Code Law No. 80-538. The Hague Evidence Convention is reproduced as Appendix C. Rules 33, 34 and 36 of the Federal Rules of Civil Procedure are reproduced as Appendix D. French Penal Code Law No. 80-538 ("French Blocking Statute") and an official translation thereof are reproduced as Appendix E.

STATEMENT

The facts of this case present a frequently recurring pattern in U.S. courts: a foreign company is sued, and counsel for plaintiff, unfamiliar with the procedures of the Hague Evidence Convention or unwilling to employ them, seeks documents and informa-

tion located abroad through domestically applicable discovery procedures. In response, the defendant moves for a protective order to require plaintiff's compliance with the terms of the treaty.

The Hague Evidence Convention provides various methods for litigants in civil and commercial disputes to obtain evidence from abroad. It is intended to help bridge the significant procedural obstacles encountered when litigants seek evidence located in a foreign country having a legal system different from our own and, in particular, to bridge the differences between the common law and civil law approaches.² The Convention is based on the principal that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." S. Exec. A, 92d Cong., 2d Sess. 11 (1972).

The letter of request procedure established by article 1 of the Convention is the method ordinarily available to litigants seeking foreign discovery. The signators to the Convention, including the United States and France, have agreed that letters of request "shall be executed expeditiously" (Art. 9, App. C at 29a), applying "appropriate measures of compulsion" (Art. 10, App. C at 29a) subject to certain limited exceptions.

Petitioners in the present case are corporations formed under the laws of the Republic of France. Petitioners maintain no corporate offices, manufacturing plants or service facilities in the United States. Hence, all of petitioners' documents and business records are located in France and thus are subject to the French Blocking Statute. This statute prohibits the disclosure of "economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence [establishment of proof] with a view to foreign judicial or administrative proceedings or in connection therewith" unless such disclosure is made in accordance with international agreements binding on

² See S. Exec. A, 92d Cong., 2d Sess. VI (1972); S. Exec. Rep. No. 25, 92d Cong., 2d Sess. 1 (1972); Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law, 8 Int'l Legal Materials 785, 806 (1969).

France. App. E at 47a. As a consequence, petitioners, their officers and employees face criminal exposure should they cooperate in discovery, such as that ordered by the courts below, which disregards the procedures of the Hague Evidence Convention.

The claims in this case arise from a plane crash near New Virginia, Iowa, on August 19, 1980. In two actions consolidated in the United States District Court for the Southern District of Iowa, plaintiffs allege that the plane manufactured by petitioners was defective and seek damages for personal injuries on a products liability theory.

In April and June 1985, plaintiffs served on petitioners several requests for admissions, a request for production of documents, and a set of interrogatories. In response to plaintiffs' discovery requests, petitioners sought a protective order to require that discovery be conducted in accordance with the provisions of the Hague Evidence Convention. They informed the court that, to the extent they had documents or information responsive to these requests, they are located in France and that their disclosure is prohibited by French law except in accordance with the Convention. The motion for a protective order was denied. The magistrate explained that his decision was based on "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts." App. B at 24a. He also speculated that the French Blocking Statute is not strictly enforced in France. App. B at 23a-24a.

Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism petitioned the court of appeals for a writ of mandamus to review the magistrate's order. Because of the novel and important questions presented, the court of appeals agreed to consider the petition on the merits. 782 F.2d at 123; App. A at 3a. Relying heavily on *Anschuetz* and *Messerschmitt*, the court held that the Hague Evidence Convention does not apply to the discovery requests here in question. It stated:

Although a minority of courts have adopted the position advanced by the Petitioners, in our opinion the better rule, which has been adopted by the vast majority of courts, is that

when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention. [782 F.2d at 124; App. A at 4a.]³

Recognizing that this rule would severely restrict the Convention's scope, the court observed that "the Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign nonparties who are not subject to an American court's jurisdiction and compulsory powers." 782 F.2d at 125; App. A at 6a.

The court then turned its attention to the French Blocking Statute which, in light of its earlier ruling that the Convention does not apply, the court treated as an independent ground for petitioners' objections to compliance with discovery orders. On the basis of *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), and its progeny, the court found that considerations of comity do not require any deference to the French Blocking Statute. 782 F.2d at 126-27; App. A at 8a-10a. Accordingly, it ordered that discovery proceed. 782 F.2d at 127; App. A at 10a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve an important issue upon which the decisions of the lower courts are divided. This issue is whether the Hague Evidence Convention, a multilateral treaty to which the United States is a signatory, is applicable to discovery of documentary evidence and information located abroad from a foreign national over whom a U.S. court has personal jurisdiction. The decision below, following Fifth Circuit precedent, held that it is not and, consequently, disregarded the Convention's procedures for gathering evidence abroad without properly weighing comity considerations. The practical consequence of this decision, if left

³ The rule stated by the Eighth Circuit has hardly been adopted by the "vast majority of courts" in the available written opinions. See notes 22-24, *infra* and accompanying text.

to stand unreviewed, will be to place most discovery aimed at foreign nationals outside the scope of the Convention and to foster international conflict over evidence gathering in U.S. proceedings.

I

THE APPLICABILITY OF THE HAGUE EVIDENCE CONVENTION'S PROCEDURES TO AMERICAN DISCOVERY IS A QUESTION OF UNDENIABLE IMPORTANCE

A basic purpose of the Hague Evidence Convention is "to improve mutual judicial cooperation in civil or commercial matters." Preamble, App. C at 26a. Although the Parties' representatives have unanimously agreed that the Convention's use should be encouraged to help avoid conflicts arising from the application of blocking statutes,⁴ the practical consequence of the decision below, and the line of cases which it represents, is to relegate the Convention to disuse in all but the most unusual circumstances.

The importance of the questions presented by this petition has been much attested. The governments of France, Germany and the United Kingdom have each urged the Court to consider them.⁵ In particular, the French authorities have communicated to the State Department their strong wish that the Court examine the issues concerning the interpretation and application of the Hague Evidence Convention raised in *Anschuetz* and *Messerschmitt*

⁴ See Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 24 Int'l Legal Materials 1668, 1679 (1985).

⁵ See Supplementary Brief in Response to the Solicitor General's Brief for the United States at 1a-4a (diplomatic notes from Federal Republic of Germany), 5a-10a (diplomatic note from France), *Anschuetz & Co. GmbH v. Mississippi River Bridge Authority* and *Messerschmitt Bolkow Blohm, GmbH v. Walker*, Docket Nos. 85-98 and 85-99; Reply Brief of Petitioner, *Anschuetz* at 1a-2a (diplomatic note from France) 3a-4a (diplomatic note from United Kingdom); Brief for the Federal Republic of Germany as Amicus Curiae, *Anschuetz*.

For the Court's convenience, the most recent diplomatic note from France is reprinted as Appendix F to this petition.

serschmitt and now by this petition. Contrary to the decision below, the French authorities hold that the Convention is the "obligatory channel"⁶ and "only legal means of obtaining evidence in civil or commercial matters for the requirements of a [foreign] judicial procedure."⁷

The government of the United States has also attested to the importance of the questions here presented, both explicitly and through its actions. The Court may recall that it has invited the Solicitor General on three prior occasions to express the views of the United States on petitions raising substantially similar issues.⁸ In each instance, the Solicitor General has acknowledged the importance of the broad question⁹ but found a ground for suggesting that the particular case at hand need not be heard. The fluctuation in the views of the Executive Branch expressed in these cases and its inability to articulate any workable rules concerning the applicability of the Hague Evidence Convention's procedures to American discovery disputes underscore the need for a ruling from this Court.

In the first case, *Volkswagenwerk A.G. v. Falzon*, 465 U.S. 1014 (1984) (*appeal dismissed*), a Michigan trial court had ordered the defendant, a German corporation, to make its employees available for depositions before U.S. consular officials in Germany. The Solicitor General informed the Court that the Hague Evidence Convention "deals comprehensively with the methods available to United States courts and litigants to obtain

⁶ App. F at 57a.

⁷ App. F at 55a.

⁸ *Volkswagenwerk A.G. v. Falzon*, 464 U.S. 811 (1983), *appeal dismissed*, 465 U.S. 1014 (1984); *Club Mediterranee S.A. v. Dorin*, 465 U.S. 1019, *appeal dismissed and cert. denied*, 105 S. Ct. 286 (1984); *Anschuetz* and *Messerschmitt*, Docket Nos. 85-98 and 85-99, 106 S. Ct. 52 (1985).

⁹ Brief for the United States as Amicus Curiae at 3, *Volkswagenwerk A.G. v. Falzon*; Brief for United States as Amicus Curiae at 3, *Club Mediterranee S.A. v. Dorin*; Brief for United States as Amicus Curiae at 6, *Anschuetz* and *Messerschmitt*.

proceedings abroad for taking evidence”¹⁰ and that “parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted.”¹¹ Accordingly, the Solicitor General advised the Court that the noticed depositions were barred by the Convention.¹² Nonetheless, the Solicitor General argued that review was unnecessary because the U.S. government had ordered its consular officials not to cooperate with plaintiff’s counsel, making execution of the Michigan court’s order impossible.¹³

In the second case, *Club Mediterranee, S.A. v. Dorin*, 105 S. Ct. 286 (1984) (*appeal dismissed and cert. denied*), a New York state court had ordered a French defendant to answer interrogatories. The defendant had represented to the court that this would require information located in France and that the French Blocking State prohibited this information’s disclosure except through the procedures of the Hague Evidence Convention.¹⁴ Again, the Solicitor General urged that review be denied, but in doing so significantly revised the position it had presented to the Court in *Falzon*. The Solicitor General, apparently having reconsidered the statements it had made in *Falzon* concerning the intent of the

¹⁰ Brief for the United States as Amicus Curiae at 5, *Volkswagenwerk A.G. v. Falzon*.

¹¹ *Id.* at 6. The Solicitor General explicitly rejected the rule, adopted by the Eighth Circuit here, that the Convention has no applicability where the court has jurisdiction over the foreign person against whom discovery is sought:

The fact that a state court has personal jurisdiction over a private party . . . does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of the parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction. [*Id.* at 7 n.3.]

¹² *Id.* at 7.

¹³ *Id.* at 11.

¹⁴ Brief for United States as Amicus Curiae at 2, *Club Mediterranee S.A. v. Dorin*.

parties to the Hague Evidence Convention, advised the Court that the Convention does not specify the exclusive means for litigants in U.S. courts to obtain discovery of evidence located in a foreign country that is a party to the Convention.¹⁵ The Solicitor General urged that American courts retain the power to demand the production of evidence from foreign nationals subject to the court’s personal jurisdiction, but that the use of such power must be tempered by principles of international comity. American courts should utilize the procedures of the Hague Evidence Convention in appropriate cases to avoid unnecessary international friction.¹⁶ Certiorari should be denied, the Solicitor General urged in *Club Med*, because the courts below had not made express findings sufficient for an adequate review of comity considerations.¹⁷

Most recently, the Court requested that the Solicitor General express the views of the Executive Branch on the scope and applicability of the Hague Evidence Convention in the two cases still pending before the Court, *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority*, No. 85-98 and *Messerschmitt Bolkow Blohm, GmbH v. Walker*, No. 85-99. The Solicitor General required six months of deliberations to inform the Court that its views had not changed since *Club Med* and that, notwithstanding “some troublesome language”, the court of appeals’ decisions “are essentially correct.”¹⁸

The Solicitor General found *Anschuetz* and *Messerschmitt* to be “essentially correct” by employing a case-by-case comity approach. This analysis is difficult to glean from the *Anschuetz* and *Messerschmitt* decisions themselves and, even were it to be adopted by this Court, would not provide any meaningful guidance to the lower courts. A more straightforward reading of the Fifth Circuit’s decisions is that the Fifth Circuit was aware of the

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3, 13.

¹⁷ *Id.* at 3-4, 13-14.

¹⁸ Brief of United States as Amicus Curiae at 6, 8, *Anschuetz* and *Messerschmitt*.

lower courts' need for guidance on the interplay between the Hague Evidence Convention and the Federal Rules¹⁹ and was providing them a clear-cut rule to follow—i.e., that the Convention “has no application at all to the production of evidence in this country”²⁰ by a person over whom the court has jurisdiction, “even where the preparatory acts occur in foreign nations.”²¹ The Solicitor General's inability to embrace this proposition and failure to articulate any workable alternative standards are themselves important reasons why the Court should address the questions presented here.

The decision below recognized the novelty and the importance of these questions in granting mandamus review. 782 F.2d at 123; App. A at 3a. Because questions concerning the Convention's application usually arise in discovery disputes which rarely survive trial, appellate review of such questions is normally by writ of mandamus which is by its nature extraordinary and difficult to obtain. *See, e.g., Boreri v. Fiat S.P.A.*, 763 F.2d 17, 20 (1st Cir. 1985) (refusing to address merits of question on interplay between Hague Evidence Convention and Federal Rules of Civil Procedure). The practical consequences of denying review in both this case and in *Anschuetz* may well be to foreclose further opportunity for the Court to address these questions in the context of a fully reasoned opinion on the merits by a U.S. circuit court. Thus, notwithstanding the Solicitor General's reservations about the rule stated in *Anschuetz* and followed by the decision below, this rule will become effectively the law of the land unless certiorari is granted.

¹⁹ *See Anschuetz*, 754 F.2d at 605-606.

²⁰ *Id.* at 615.

²¹ *Id.* at 611.

II

THERE IS A SHARP DIVISION AMONG THE LOWER COURTS ON THE INTERPLAY BETWEEN THE HAGUE EVIDENCE CONVENTION AND THE FEDERAL RULES

There is considerable confusion among the lower federal and state courts on when the Hague Evidence Convention applies to discovery of documents and information located abroad from a foreign litigant, and whether, assuming it applies, a court may disregard its procedures. Broadly speaking, there are two major competing viewpoints. First, the decision below and the line of cases which it represents hold that the Convention is not applicable when the court has jurisdiction over a foreign litigant “even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention.”²² Second, other courts, including the West Virginia Supreme Court, have concluded that the Convention does apply to such discovery requests and that considerations of comity require that its procedures be employed at least in the first instance.²³ Other points of view are expressed in the case law as well. For

²² 782 F.2d at 124, App. A at 4a. *See Anschuetz* 754 F.2d at 611, *Messerchmitt*, 757 F.2d at 731; *Lowrance v. Michael Weinig, GmbH & Co.*, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985); *Wilson v. Lufthansa German Airlines*, 108 A.D. 2d 393, 489 N.Y.S. 2d 575, 577 (1985); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 444 (S.D.N.Y. 1984); *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 520-24 (N.D. Ill. 1984).

²³ *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher*, 328 S.E.2d 492, 504-06 (W. Va. 1985); *Th. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443, 445 (Tex. Ct. App. 1984); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686, 690 (1984); *General Electric Co. v. North Star Int'l, Inc.*, No. 83 C 0838 (N.D. Ill. 1984) (memorandum opinion and order); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983); *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) 17,222, 17,223-24 (N.D. Ill. 1983); *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 243-44, 186 Cal. Rptr. 876 (1982); *Volkswagenwerk*

example, certain trial courts have ruled that the Hague Evidence Convention is the exclusive means for obtaining evidence abroad.²⁴

In *Anschuetz*, the Solicitor General has told the Court that "the differences between the West Virginia Supreme Court and the Fifth Circuit are relatively modest and do not create a meaningful conflict requiring this Court's review."²⁵ Whatever the merits of the reasoning underlying this somewhat surprising conclusion, however, it does not eliminate the conflict created by the decision below. According to the Solicitor General's interpretation of *Anschuetz* and *Starcher*, both courts engaged in a comity analysis of whether to follow the Convention's procedures and reached different results on the basis of factual differences

²⁴ See, e.g., *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention); see also Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. Pa. L. Rev. 1461 (1984).

Some lower court decisions might be characterized as representing a fourth point of view: that the Convention applies to all discovery against foreign persons, but rarely, if ever, does comity require its procedures to be employed where the court has jurisdiction over the foreign person. See, e.g., *Work v. Bier*, 106 F.R.D. 45 (D.D.C. 1985); *Slauenwhite v. Bekum Maschinenfabriken GmbH*, 104 F.R.D. 616, 618-19 (D. Mass. 1985); *Graco v. Kremlin, Inc.*, 101 F.R.D. at 520-24; *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227, 1229 (E.D. Pa. 1983); *International Society for Krishna Consciousness v. Lee*, 105 F.R.D. at 443-44. This viewpoint confounds in personam jurisdiction with the power to compel discovery. See Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 741-44 (1983).

²⁵ Brief of the United States as Amicus Curiae at 19, *Anschuetz* and *Messerschmitt*.

which "the Court is not well postured to address."²⁶ Here, the decision below makes no pretext of weighing comity considerations. It states clearly that it is adopting the "rule" of *Anschuetz* that, where there is in personam jurisdiction over a foreign litigant, the Hague Evidence Convention has no applicability. 782 F.2d at 124; App. A at 4a. Thus, if, as the Solicitor General has claimed, the prior decisions "do not create a meaningful conflict," their juxtaposition with the decision below clearly does.

III

THE FAILURE OF THE DECISION BELOW TO INTERPRET AND ADMINISTER THE HAGUE EVIDENCE CONVENTION ACCORDING TO ITS TERMS WILL FOSTER INTERNATIONAL CONFLICT OVER EVIDENCE GATHERING IN U.S. PROCEEDINGS

In addition to the importance of the questions presented and the sharp division among the lower courts on these questions, the Eighth Circuit's decision is contrary to basic canons of treaty construction and fails to adhere to the principles of international comity discussed in the better reasoned cases²⁷ and much stressed in the views of the Solicitor General. The language and negotiating history of the Hague Evidence Convention make clear that it applies to discovery requests such as those here in issue. In order to avoid a conflict between the Federal Rules of Civil Procedure and the French Blocking Statute, principles of comity require in the present case that resort be made to the Hague Evidence Convention, at least in the first instance. The decision below interprets the treaty in contravention of the Parties' intent and

²⁶ *Id.*

²⁷ See, e.g., *Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher*, 328 S.E.2d at 501-06; *Compagnie Francaise d'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16, 28-36 (S.D.N.Y. 1984); *Vincent v. Ateliers de La Motobecane, S.A.*, 475 A.2d at 690-91; *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d at 857-59.

fosters conflicts which they have agreed the Convention should be used to avoid.²⁸

A. The Hague Evidence Convention by Its Terms Applies to the Discovery Requests In Issue Here

The duty of the courts is "to interpret [a treaty] and administer it according to its terms." *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1854). This task begins "with the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 105 S. Ct. 1338, 1341 (1985).

Nowhere in the Hague Evidence Convention is a distinction drawn between parties and non-parties, and such an interpretation undermines its structure. In *Volkswagenwerk A.G. v. Falzon*, the Solicitor General explicitly rejected such a distinction, stating that the Convention's "strictures apply regardless of the existence of personal jurisdiction."²⁹

The interpretation of the treaty by the decision below disregards the context in which it was written. Article 1 of the Convention permits a "judicial authority of a Contracting State" to "request the competent authority of another Contracting State, by means of a Letter of Request to obtain evidence, or to perform some other judicial act." App. C at 26a. This phrasing reflects the jurisprudence of the civil law countries which regard the taking of evidence as a judicial function rather than as an act of the parties; when evidence is taken without the participation or consent of officials of the host country, its "judicial sovereignty" is considered violated. See Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp. L.Q. 646, 647 (1969); Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law, 8 Int'l Legal Materials 785, 804, 806 (1969). A letter of request or "letter

²⁸ See Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 24 Int'l Legal Materials 1668, 1679 (1985).

²⁹ Brief of United States as Amicus Curiae at 7 n.3, quoted in full at note 11, *supra*.

rogatory" is the procedure by which such participation or consent has traditionally been obtained.³⁰ To construe this procedure as having no applicability whenever a U.S. court asserts personal jurisdiction over a litigant who controls evidence located abroad is to exclude the most common case from the Convention's procedures. This would make violation of the judicial sovereignty of civil law countries the rule rather than the exception and relegate the Convention's procedures to disuse.

"[T]reaties are construed more liberally than private agreements, and to ascertain their meaning [the Court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); see *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933). The governments of France and Germany have indicated that they regard the procedures of the Hague Evidence Convention as mandatory and exclusive. In *Volkswagenwerk, A.G. v. Falzon*, the Solicitor General endorsed this interpretation of the treaty stating: "The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted."³¹ Although the Solicitor General's brief in *Anschuetz* now takes the position that the Convention's procedures are not exclusive, the comity analysis which is commended presupposes the Convention's applicability to all discovery against foreign litigants. Otherwise, the Hague Evidence Convention would not remain "a valuable and workable mechanism for obtaining evidence abroad" or for reducing conflicts with "the laws or clearly articulated policies of a foreign government."³²

³⁰ See Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures*, 13 Int'l Law. 5, 10-11 (1979).

³¹ Brief of United States as Amicus Curiae at 6.

³² Brief of United States as Amicus Curiae at 13, *Anschuetz* and *Messerschmitt*.

B. Application of Principles of International Comity to the Present Case Requires Resort to the Procedures of the Hague Evidence Convention in the First Instance

Assuming that the procedures of the Hague Evidence Convention are non-exclusive, it does not follow that their use is entirely discretionary. Principles of comity require that resort be made to the Convention in the first instance,³³ at least when the issue is timely raised.³⁴ In particular, "American courts should refrain, whenever it is feasible, from ordering a person to engage in activities that would violate the laws of a foreign nation." *Compagnie Francaise D'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. at 28.³⁵ Only if efforts to obtain evidence under the Convention's procedures prove unsuccessful, should use of domestic discovery rules be considered.

Comity is not "a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Under the principle of comity, U.S. courts seek to accommodate important sovereign interests of other nations as expressed through their legislative, executive or judicial acts, where such accommodation can be achieved consistent with the rights of U.S. citizens and others under the protection of U.S. laws. *Id.* "Rulings based in this concept of international comity are dictated not by technical principles of jurisdiction of the parties to or subject matter of particular lawsuits, but rather by exercise of judicial self-restraint in furtherance of policy considerations which transcend individual

³³ See authorities cited in note 23, *supra*.

³⁴ See, e.g., *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984) (defendant who failed to make timely motion for protective order waived right to claim protection under the Convention); *Murphy v. Reifenhauer K.G. Maschinenfabrik*, 101 F.R.D. 360, 361, 363 (D. Vt. 1984) (motion to compel granted where defendant failed to raise objections based on Convention until it had already answered two sets of interrogatories).

³⁵ The Solicitor General's comity analysis endorses this proposition. See Brief for United States as Amicus Curiae at 11, *Anschuetz and Messerschmitt*.

lawsuits." *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d at 857, 176 Cal. Rptr. at 884. Precisely because this exercise is so flexible and far reaching, trial courts need clear guidelines or presumptions to apply in recurring cases.

A rule ordinarily requiring resort to the Convention in the first instance would insure that principles of comity are given adequate consideration. Lacking definite standards, a trial court is often swayed by the immediacy of the discovery demands made by the litigant standing before it, and there is a tendency to dismiss countervailing considerations as merely abstract or hypothetical questions of judicial sovereignty. See, e.g., *Murphy v. Reifenhauer*, 101 F.R.D. at 363. Moreover, because the question of whether to require adherence with the Convention's procedures generally arises in discovery, courts are often called upon to balance comity considerations on the basis of a scanty factual record. As a result, their findings are often conclusory and result-oriented.³⁶

³⁶ For example, several courts have reached the conclusion that requiring a litigant to employ the Convention's procedures would be "futile" on the basis of little or nothing more than a declaration under article 23, which states that a Party may reserve the right not to execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries" (App. C at 26a). See, e.g., *Anschuetz*, 754 F.2d at 612; *Wilson v. Lufthansa German Airlines*, 489 N.Y.S.2d at 578. This provision, however, was not intended to preclude U.S. litigants from obtaining necessary evidence from abroad, but rather to prevent discovery of a "fishing expedition" nature. See Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 17 Int'l Legal Materials 1417, 1421 (1978). "Refusals to execute turn out to be very infrequent in practice." Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 17 Int'l Legal Materials 1425, 1431 (1978). Moreover, decisions such as *Anschuetz* and *Wilson* ignore the undertakings made by the Parties to the Convention to implement legitimate discovery requests. See Arts. 9, 10, 12, App. C at 29a-30a.

In the abstract, there is no conflict between the Hague Evidence Convention and the federal discovery rules. Both are means by which evidence can potentially be sought. The federal discovery rules, however, frequently run afoul of foreign statutes, policies or procedures, and it was in large measure to avoid the friction which such conflicts create that the Convention was adopted.³⁷ A general rule requiring use of Convention procedures in the first instance would, consistent with the framers' purpose, hold such conflicts to a minimum.

In this particular case, disclosure of the documents and information sought will violate the French Blocking Statute and subject petitioners to criminal penalties *unless* such disclosure is made through the procedures of the Convention. The decision below did not squarely address this consideration. It examined the French Blocking Statute as an objection to discovery only after it had decided that the Hague Evidence Convention does not apply. The court failed to consider the two together.

Throughout the entire appellate and trial court record, the only factors mentioned as weighing against the use of Convention procedures are the inconvenience and potential delay their use might engender. These factors, however, will be present in every case where the Convention is invoked. Thus the decision below, if left to stand unreviewed, will amount to judicial abrogation of the treaty. *See Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

³⁷ See Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law, 8 Int'l Legal Materials 785, 820 (1969); Restatement of U.S. Foreign Relations Law (Revised, Tent. Draft No. 6 (Vol. 1)) 333 (1985) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States.").

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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Appendix A

**In re SOCIETE NATIONALE INDUSTRIELLE AERO-
SPATIALE and Societe de Construction d'Avions de Tourism,
Petitioners**

No. 85-2306.

United States Court of Appeals,
Eighth Circuit.

Jan. 22, 1986.

Before McMILLIAN, ARNOLD, and FAGG, Circuit Judges.

FAGG, Circuit Judge.

Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism (Petitioners), corporate defendants in a civil action pending in the United States District Court for the Southern District of Iowa, have petitioned this court under Rule 21(a) of the Federal Rules of Appellate Procedure for a writ of mandamus directed at United States Magistrate Ronald E. Longstaff. We conclude that the petition should be denied.

I. PROCEDURAL BACKGROUND

The Petitioners, corporations owned by the Republic of France, design, manufacture, and market aircraft. Although the Petitioners design and manufacture their aircraft in France, they advertise and sell their aircraft in the United States. In 1980, an aircraft sold by the Petitioners was involved in an accident near New Virginia, Iowa. As a result of this accident, Dennis Jones, John George, and Rosa George (collectively "Plaintiffs") instituted actions for damages against the Petitioners. These actions were consolidated and are pending in the United States District Court for the Southern District of Iowa. Upon the parties' consent, the district court referred the actions to a magistrate in accordance with 28 U.S.C. § 636(c)(1).

The Plaintiffs served the Petitioners with a series of interrogatories, requests for admissions, and requests for production of documents under the Federal Rules of Civil Procedure. The Petitioners moved for a protective order contending that, to the

extent they possessed the documents or information requested by the Plaintiffs, the material was located in France. Thus, the Petitioners argued that the Plaintiffs must conduct their discovery in accordance with the procedures set forth in the Multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 ("Hague Convention" or "Convention"), to which the United States and France are signatories. The Petitioners also insisted that they should not be required to comply with the Plaintiffs' discovery requests, because to do so could subject the Petitioners to criminal liability under French Penal Code Law No. 80-538, Art. 1-*bis* ("French Blocking Statute"). The magistrate denied the Petitioners' motion for a protective order and ordered the Petitioners to comply with the Plaintiffs' discovery requests. The Petitioners then filed this application for a writ of mandamus, and the magistrate's order has been stayed pending a decision from this court.

II. JURISDICTION

Mandamus review generally is available only in extraordinary situations, *Kerr v. United States*, 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); *Central Microfilm Service Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1212 (8th Cir.1982), *cert. denied*, 459 U.S. 1204, 103 S.Ct. 1191, 75 L.Ed.2d 436 (1983), and is not ordinarily available to obtain immediate appellate review of an interlocutory discovery order. *Kerr*, 426 U.S. at 402-03, 96 S.Ct. at 2123-24; *In re Burlington Northern, Inc.*, 679 F.2d 762, 767-68 (8th Cir.1982); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 599 (8th Cir.1977), *modified on other grounds*, 572 F.2d 606, 611 (8th Cir.1978) (en banc). However, mandamus review may be appropriate to provide guidelines for the resolution of novel and important questions presented in the discovery order that are likely to recur. *Central Microfilm*, 688 F.2d at 1212, *citing Schlagenhauf v. Holder*, 379 U.S. 104, 111-12, 85 S.Ct. 234, 238-39, 13 L.Ed.2d 152 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 254-55, 258, 77 S.Ct. 309, 312-13, 314, 1 L.Ed.2d 290 (1957); *General Motors Corp. v. Lord*, 488 F.2d 1096, 1099 (8th Cir.1974). See also Note, *Supervisory*

and Advisory Mandamus Under the All Writs Act, 86 Harv.L.Rev. 595 (1973).

This is the first time this court has been called upon to consider the novel and important questions concerning the interplay between the Federal Rules of Civil Procedure, the Hague Convention, and the French Blocking Statute. In addition, because the Plaintiffs are in the initial stages of discovery, and because the nature of the discovery requests at issue indicate that the answers generated from these requests may necessitate further discovery, we believe the questions presented here may well recur prior to any opportunity to review a final judgment. Thus, we conclude that this is an appropriate situation for mandamus review, and accordingly we will consider the petition on the merits.

III. THE HAGUE CONVENTION

Unlike the practice in the United States and other common law countries where pretrial discovery is considered a private matter primarily conducted by attorneys, France and other civil law countries regard discovery as a judicial function, to be accomplished by the courts. An attempt by an attorney from a common law country to gather evidence in a civil law country for a proceeding abroad has been considered an unlawful usurpation of the public judicial function, and an illegal intrusion on that nation's judicial sovereignty. *Compagnie Francaise D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 26 (S.D.N.Y.1984); Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp.L.Q. 646, 647 (1967).

In response to this problem, the Hague Convention was designed to accommodate the civil law signatories' concerns for judicial sovereignty with the needs of litigants to collect evidence within those countries. To effectuate this purpose, the drafters of the Hague Convention provided procedures for the taking of evidence that would be "tolerable" in the country where the discovery takes place and "utilizable" in the forum country. See *Report of the United States Delegation to the Eleventh Session of Hague Conference on Private International Law*, 8 Int'l Legal Materials 785, 806 (1969); Amram, *The Proposed Convention on*

the Taking of Evidence Abroad, 55 A.B.A.J. 651, 652 (1969). Although foreign participation in drafting the Hague Convention stemmed from a perception that discovery efforts by American litigants were excessively broad and intrusive on the foreign countries' judicial sovereignty, United States participation was prompted by the frustration American lawyers had experienced in obtaining evidence in the foreign countries. Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U.Pa.L.Rev.1960, 1965 (1984); Amram, 55 A.B.A.J. at 651. Of course, the civil law signatories' concern for judicial sovereignty would only be threatened when discovery procedures that are typically considered a judicial function are actually undertaken within the signatories' borders by a private party.

The Petitioners contend that because the Hague Convention is an international treaty specifically designed to accommodate the differences in the taking of evidence between common law and civil law countries, it provides the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory. Alternatively, the Petitioners argue that principles of international comity dictate that the Hague Convention be the method of first resort to gather information abroad, until it becomes apparent that such efforts will be futile.

Although a minority of courts have adopted the position advanced by the Petitioners, in our opinion the better rule, which has been adopted by the vast majority of courts, is that when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention. In particular, we agree with the analysis of the Fifth Circuit in *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir.1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No.85-98), that

[T]he Convention does not require deference to a foreign country's judicial sovereignty over documents, people, and

information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States. * * * “[D]iscovery does not ‘take place within [a state’s] borders’ merely because documents to be produced somewhere else are located there. Similarly, discovery should be considered as taking place here, not in another country, when interrogatories are served here, even if the necessary information is located in the other country.”

In essence, matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention.

Anschuetz, 754 F.2d at 611 (quoting *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (N.D.Ill.1984)) (footnote omitted).

The discovery sought in this case neither intrudes on nor threatens French judicial sovereignty or custom. The magistrate's order does not require any foreign attorneys to appear in France to conduct discovery procedures that are typically considered a judicial function by France and other civil law countries. The order simply requires the Petitioners, who are parties subject to the jurisdiction of a United States court, to perform certain acts preparatory to the production of documents and information in the United States. These acts do not require any French judicial participation. Hence, we conclude that the Hague Convention does not apply to the discovery sought in this case “because the proceedings are in a United States court, involve only parties subject to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad.” *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729, 731 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-99).

We disagree with the Petitioners' contention that such a conclusion will undermine the Hague Convention's stated purpose and render the entire Convention meaningless. The Hague Convention is intended not only to accommodate what civil law countries perceived as a threat to their judicial sovereignty, but also to aid common law litigants in their efforts to gather

information within the civil law countries and facilitate the exchange of information between nations. Furthermore, our ruling will not require any discovery to take place in France, and therefore the Convention's purpose of protecting French judicial sovereignty will not be undermined. On the contrary, we believe that a rule requiring domestic litigants to resort to the Hague Convention to compel discovery against a foreign litigant when the district court has jurisdiction over the parties would needlessly delay and frustrate the discovery process, undermining the Convention's purpose of aiding in the flow of information between nations.

In addition, the Hague Convention is justified by other considerations.

Two important purposes of an international convention of this type relate to discovery of non-parties, and would justify the Convention's existence regardless of how the Convention is deemed to apply with respect to parties before the court. First, a non-party witness may be willing to be deposed at home, but may be unwilling to travel to the country in which the litigation is proceeding. Since some countries would consider the taking of evidence within their borders a usurpation of judicial prerogative, an international agreement setting up a framework for seeking and granting permission has great value, allowing evidence to be taken without affront to local authorities. Second, an unwilling non-party witness simply cannot be reached, if outside the court's jurisdiction, unless authorities in the witness' state use their authority to compel the giving of evidence. An international agreement provides a framework for the invocation of a foreign authority's compulsory powers, making accessible evidence which otherwise would not have been accessible. A multi-state convention, rather than a series of two-state agreements, confers the added benefit of standardized procedures.

Graco, 101 F.R.D. at 520 (footnotes omitted). Thus, the Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign nonparties who are not subject to an American court's jurisdiction and compulsory powers.

The Petitioners also contend that principles of international comity require that the Plaintiffs first attempt discovery through the Hague Convention procedures, and only if their discovery efforts prove futile, the Plaintiffs may then rely on the discovery procedures in the Federal Rules of Civil Procedure. Although we recognize that several courts have required first resort to the Hague Convention, see e.g., *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D.Pa. 1983); *General Electric Co. v. North Star Int'l, Inc.*, No. 83-C-0838, slip op. (N.D.Ill. Feb. 21, 1984); *Schroeder v. Lufthansa German Airlines*, No. 83-C-1928, slip op. (N.D.Ill. Sept. 15, 1983), we agree with the court in *Ansuetz* that "the greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure." *Ansuetz*, 754 F.2d at 613. We believe that such a policy would defeat rather than promote international comity.

IV. THE FRENCH BLOCKING STATUTE

The Petitioners further insist that they should not be required to comply with the magistrate's discovery order, because to do so would subject them to potential criminal liability under the French Blocking Statute. The relevant provisions of the French Blocking Statute provide as follows:

Article 1—*bis*—Subject to treaties or international agreements and laws and regulations in force, it is forbidden to all persons to ask, research or communicate, by writing, orally or under any other form, documents or information on economical, commercial, industrial, financial or technical matters leading to establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings.

* * * * *

Article 2—The persons affected by articles 1 and 1A must inform, without any delay, the Minister in charge whenever they are requested in any manner to provide such information.

* * * * *

Article 3—Without prejudice to heavier sanctions stipulated by the law, any infraction to the present Law Articles 1 and 1A provisions will be punished with two months to six months imprisonment and with a 10,000 to 120,000 french francs fine or any one of these two penalties only.

Law No. 80-538 of July 18, 1980 (translation attached as exhibit A to *Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc.*, 99 F.R.D. 269, 273-74 (N.D. Ill. 1983)). The Petitioners contend that because the magistrate's discovery order does not require the Plaintiffs to obtain the requested evidence in accordance with a treaty or international agreement (the Hague Convention), the discovery order requires the Petitioners either to (1) comply with the discovery order and violate Article 1—*bis*, subjecting the Petitioners to the criminal penalties in Article 3, or (2) refuse to comply with the order and face possible sanctions in the district court. In our view, the issues the Petitioners raise must be addressed in two stages.

First, we must consider whether the magistrate was correct in ordering the Petitioners to comply with the Plaintiff's discovery requests, even though compliance may require the Petitioners to violate the French Blocking Statute. The magistrate properly recognized that "[t]he fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production." *United States v. First National Bank of Chicago*, 699 F.2d 341, 345 (7th Cir.1983). See also *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-06, 78 S.Ct. 1087, 1091-92, 2 L.Ed.2d 1255 (1958); *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 997 (10th Cir.1977) (citing *Societe Internationale*). Rather, the court must consider the competing interest at stake in each case and strike a careful balance between the competing interest and the extent to which those interest will be affected before determining whether or not to compel discovery. *United States v. Davis*, 767 F.2d 1025, 1034-35 (2d Cir.1985); *First National Bank of Chicago*, 699 F.2d at 345.

The magistrate employed a balancing test derived from section 40 of the Restatement (Second) of the Foreign Relations Law of the United States, which has been utilized by a number of other circuits. See, e.g. *Davis*, 767 F.2d at 1034-36 (2d Cir.); *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817, 827-29 (11th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 778, 83 L.Ed.2d 774 (1985); *First National Bank of Chicago*, 699 F.2d at 345-46 (7th Cir.); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1288-91 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). Section 40 provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- (a) vital national interests of each of the states;
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state.
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Restatement (Second) Foreign Relations Law of the United States § 40 (1965). After carefully reviewing the magistrate's analysis of the competing national interests, we conclude that the district court properly ordered the Petitioners to comply with the Plaintiffs' discovery requests.

The second stage of inquiry is whether the magistrate may impose sanctions against the Petitioners if the French Blocking Statute prevents them from complying with the discovery order. In *Societe Internationale* the Supreme Court held that although a court has the authority to order a foreign party to produce evidence when such production may subject the party to criminal sanctions in his own country, the foreign party's good faith in

attempting to comply with the order is relevant to what sanctions, if any, should be imposed in the event of noncompliance. 357 U.S. at 212, 78 S.Ct. at 1095. The Supreme Court found that, on the record presently before the Court, the Plaintiff had demonstrated its good faith in attempting to comply with the discovery requests and in attempting to secure a waiver of prosecution from the foreign government. Thus, the Court ruled that the sanction of dismissal of the Plaintiff's complaint with prejudice for non-compliance was not justified. *Id.* at 213, 78 S.Ct. at 1096. The court did, however, state that on remand the district court possessed wide discretion to proceed in whatever manner it deemed most effective and that the government could introduce additional evidence to challenge the Plaintiff's good faith. *Id.*

The record before this court does not indicate whether the Petitioners have notified the appropriate French Minister of the requested discovery in accordance with Article 2 of the French Blocking Statute, or whether the Petitioners have attempted to secure a waiver of prosecution from the French government. Because the Petitioners are corporations owned by the Republic of France, they stand in a most advantageous position to receive such a waiver. However, these issues will only be relevant should the Petitioners fail to comply with the magistrate's discovery order, and we need not presently address them.

Accordingly, we order that the petition for a writ of mandamus be denied. The case is remanded to the district court with instructions to lift its stay and proceed in accordance with this order.

It is so ordered.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

CIVIL NO. 82-453-C

DENNIS F. JONES,
Plaintiff,

vs.

SOCIETE NATIONALE INDUSTRIELLE
AEROSPATIALE,

a French Corporation, et al.,
Defendants.

JOHN GEORGE, et al.,
Plaintiffs,

vs.

SEED & GRAIN CONSTRUCTION CO.,
an Iowa Corporation, et al.,
Defendants.

[Filed July 31, 1985]

ORDER

This matter is now before the Court upon the motion for protective order filed by defendants Societe Nationale Industrielle Aerospatiale and Societe De Construction d'Avions De Tourisme on June 12, 1985. Plaintiffs filed a resistance to this motion on June 19, 1985. The parties have submitted briefs and oral arguments were presented to the Court at a hearing on Tuesday, July 16, 1985.

I. BACKGROUND

Defendants are French corporations engaged in advertising and selling aircraft and component parts in the United States. After an accident occurred on August 19, 1980, involving an aircraft designed and manufactured by the defendants, this lawsuit was

instituted. The defendants have appeared and answered and are subject to this Court's jurisdiction.

The defendants responded to plaintiff's initial requests for production in August 1983 and in return, propounded interrogatories and made requests for production to plaintiff. Plaintiff has now served interrogatories upon the defendants and additional requests for production and admissions, which defendants resist. Defendants argue that plaintiff must comply with the Hague Evidence Convention in order to properly undertake discovery in this lawsuit. Plaintiff resists, claiming in personam jurisdiction over the defendant nullifies application of the Hague Convention and, further, that the courts in this country have interpreted the Convention as applying to taking evidence abroad, not within this country.

II. APPLICABLE LAW AND DISCUSSION

The issue brought before the Court is whether the Hague Evidence Convention supplants application of the discovery procedures of the Federal Rules of Civil Procedure to foreign nationals subject to in personam jurisdiction in a U.S. court.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters provides three methods of obtaining evidence abroad: by a letter rogatory, requesting authorities in a signatory state to obtain evidence or to perform some other judicial act to obtain evidence; by notice to appear before an American consulate officer or foreign officer; or by designation of a private commissioner. The Hague Convention, 23 U.S.T. 2555, TIAS No. 7444. Under the letter rogatory method, the letter of request is transmitted to the central authority of the foreign state and must specify:

- (a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

- (d) the evidence to be obtained or other judicial act to be performed.

Other information as needed must also be specified, according to Article 3. 23 U.S.T. 2558-59. Letters of Request must be in the language of the authority requested to execute it or be accompanied by a translation into that language. Art. 4. France has made an authorization pursuant to Art. 33, providing that it will execute only letters in French or accompanied by a translation in French. 28 U.S.C.A. §§ 1635-1960, 1984 pocket part, p. 90.

While the issue of whether the Hague Convention must override the Federal Rules of Civil Procedure is not widely addressed in case law, there appears to be a split among the jurisdictions which have addressed the issue.

The most recent case resolving the issue in favor of permitting discovery is *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985). This case involved product liability claims arising out of the collision of two ferry boats within the state of Louisiana. Anschuetz, a German corporation, was third-partied in as designer of a steering device which allegedly failed, contributing to the cause of the accident. Third-party plaintiff Gijonesa served interrogatories, requests for production and notices of depositions, to which Anschuetz responded with a motion for protective order. Upon petition for writ of mandamus, the Fifth Circuit invited amicus curiae briefs from the Federal Republic of Germany and from the U.S. Department of Justice as the question was being considered for the first time by a circuit court. In a carefully researched opinion, the court reached the conclusion that the Hague Convention would be used with

the involuntary deposition of a party conducted in a foreign country, and with the production of documents or other evidence gathered from persons or entities in the foreign country who are not subject to the court's in personam jurisdiction. The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal rules. So long as discovery is sought for the identity and qualifications of witnesses there is no basis to suggest

that supplying this information amounts to obtaining evidence in Germany.

Id. at 615.

Some of the language explaining the court's rationale for this conclusion should be noted:

Ansuetz' interpretation of the treaty, taken to its logical conclusion, would give foreign litigants an extraordinary advantage in United States courts. Insofar as Ansuetz seeks discovery it would be permitted the full range of free discovery procedures provided by the Federal Rules. But when a United States adversary sought discovery, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention. Further, we believe that requiring domestic litigants to resort to the Hague Convention to compel discovery against their foreign adversaries encourages the concealment of information—a result directly antithetical to the express goals of the Federal Rules and the Hague Convention which aim to encourage the flow of information among adversaries.

Id. at 606. The court rejected the argument that the Hague convention was exclusive:

"the fact that documents are situated in a foreign country does not bar their discovery." (quoting *Cooper Industries v. British Aerospace*, 102 F.R.D. 918 (S.D.N.Y. 1984) and citing *Marc Rich & Co. v. U.S.*, 707 F.2d 663, 667 (2d Cir.) (grand jury investigation), *cert. denied*, 103 S. Ct. 3555 (1983).

* * *

The production demanded here does not infringe on British sovereignty as it calls merely for documents, not a personal appearance. Defendant cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad. Nor can it shield documents by destroying its own copies and relying on customary access to copies maintained by its affiliate

abroad. If one defendant could so easily evade discovery, every United States company would have a foreign affiliate for storing sensitive documents.

(quoting *Cooper*, 102 F.R.D. 920).

Id. at 607. *Cooper*, it should be noted, dealt with the discovery of documents in the possession of the defendant's British affiliate; by contrast, *Jones v. Societe* (and *Ansuetz*) deal with documents in the possession of a totally foreign corporation. The Fifth Circuit further backed up its position with language from a federal district court sitting in Illinois deciding similar discovery issues in a patent infringement case. The court in *Graco v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984), in permitting the discovery from a French corporation without requiring compliance with the Hague Convention, explained the reasons for the Hague Convention:

It cannot be denied that foreign displeasure played some part in shaping the convention, but it is a mistake, the court believes, to view the convention as an international agreement to protect foreign nationals from American discovery when they are parties properly before American courts. Two important purposes of an international convention of this type relate to discovery of non-parties, and would justify the convention's existence regardless of how the convention is deemed to apply with respect to parties before the court. First, a non-party witness may be willing to be deposed at home, but may be unwilling to travel to the country in which the litigation is proceeding. Since some countries would consider the taking of evidence within their borders a usurpation of judicial prerogative, an international agreement setting up a framework for seeking and granting permission has great value, allowing evidence to be taken without affront to local authorities. Second, an unwilling non-party witness simply cannot be reached, if outside the court's jurisdiction, unless authorities in the witness' state use their authority to compel the giving of evidence. An international agreement provides a framework for the invocation of a foreign authority's compulsory powers, making accessible evidence which otherwise would not have been accessible. A multi-state

convention, rather than a series of two state agreements, confers the added benefit of standardized procedures.

Id. at 519-20 (quoted in *Anschuetz* at 611). Civil law states take the position that gathering evidence *within* the state is exclusively within the province of that state's courts; any encroachment on this function may be regarded as a violation of the state's "judicial sovereignty." *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 853, 176 Cal. Rptr. 874, 881 (1982).

The *Anschuetz* court found "particularly apt the [Graco] court's observation that the Convention does not require deference to a foreign country's judicial sovereignty over documents, people, and information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States. . . ." *Anschuetz*, 754 F.2d at 611. The Fifth Circuit determined that "matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention." *Id.* Another effect of requiring that interrogatories and document requests be directed through foreign authorities under the Convention, the court noted, was the drastic and costly change in handling litigation which would occur due to the procedures required under the Convention. *Id.* at 612.

The Fifth Circuit did note that judicial power over international discovery should be "tempered by a healthy respect for the principles of comity", *id.* at 614 but found

[T]he Hague Evidence Convention contains no express provision for exclusivity. In addition, extraterritorial discovery has been a standard practice of American courts for some time, and there is no evidence that the American negotiators, the Department of State, or the Congress intended to prohibit the practice. In fact, the Senate Report emphasized that the Convention was intended to improve, not thwart, the means of securing evidence abroad.

As noted by defendants, the *Anschuetz* court did not order discovery or issue mandamus, but did direct the lower court to consider fashioning its discovery orders in light of the principles

discussed by the Fifth Circuit. *Id.* The Court of Appeals did state that the trial court could order documents to be produced and witnesses to be examined in the United States if the defendant was not "voluntarily forthcoming in Germany" and that the "full range of sanctions available in the federal rules" could be applied to parties over whom the court had in personam jurisdiction. *Id.*

Other courts which have addressed the issue have allowed discovery and discussed the arguments now being advanced by the defendant French corporations. Regarding defendant Lufthansa's argument that the Hague Convention is the exclusive means for compelling it to produce documents and secure the deposition of two of its officers:

Nowhere in these [discovery] Rules is there the slightest suggestion that a party properly before the Court may not avail itself of these discovery rights against another party within the jurisdiction of the Court merely because the documents sought or the persons to be deposed are not located in the United States. Indeed, the Rules clearly contemplate their applicability abroad if the United States Court has jurisdiction. *See, e.g., Rule 28(b), Fed. R. Civ. P.*

Laker Airways, Ltd. v. Pan American World Airways, 103 F.R.D. 42, 48 (D.C.D.C. 1984). In determining that the issue was not a matter of supremacy over state law, but rather which federal law—the Hague Convention or the Federal Rules of Civil Procedure—should be applied, the district court for the Southern District of New York reasoned:

A finding that the production of documents is precluded by foreign law does not conclude a discovery dispute. A United States court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary. *Society International v. Rogers*, 357 U.S. 197, 204-06 (1958); *United States v. First National City Bank*, 396 F.2d 897, 900-09 (2d Cir. 1968); *United States v. Vetco*, 644 F.2d 1324, 1329 (9th Cir., cert. denied, 454 U.S. 1098 (1981)). Plaintiffs have urged this Court to defer to the French [blocking] statute and to decline to order the requested discovery.

In fact, it is suggested that we are required to do so, because Article 11 and 21 of the Hague Convention on the Taking of Evidence Abroad would permit a party confronted with a statute such as Article 1 to refuse to give evidence. Because the United States is a signatory to the Convention, the argument continues, this Court is bound by its provision and must also permit plaintiffs to refuse to produce the documents. In essence, plaintiffs argue that the Articles of the Hague Convention withdraw from this court the right to employ the discovery devices provided in the Federal Rules of Civil Procedure because they conflict with the provisions of the French Law No. 80-538.

The Hague Convention, signed by both France and the United States, is an international treaty and as such is entitled to be recognized as part of the supreme law of the land. (citation omitted.) The Federal Rules of Civil Procedure, duly enacted by Congress, are also part of the supreme law of the land. Absent a direct conflict, our duty is to enforce them both. Nothing in the legislative history of the Hague Convention nor in the Congressional proceedings at the time of its adoption, suggests that Congress intended to replace, restrict, modify or repeal the Federal Rules. Indeed, Philip Amram, a member of the United States delegation to the 1968 session of the Convention, described its provisions as a 'climax [of] more than a generation of effort . . . by those interested in modernizing and improving international judicial assistance' and stated it would effect 'no major changes in U.S. procedure [nor require any] changes in U.S. legislation or rules.' (citation omitted.)

Treaties should be construed so as to effect their purposes (citation omitted), and to be as consistent, insofar as possible, with coexisting statutes, (citation omitted). The goal of the Hague Convention was to facilitate and increase the exchange of information between nations. It would not serve this goal to transform its provisions into a means to frustrate the discovery process. We conclude, therefore, that this Court is not required to defer to the French statute by virtue of the Hague Convention.

Compagnie Francaise d'Assurance v. Phillips Petroleum Co., 81 Civ. 4463-CLB, slip op. at 10-12 (S.D.N.Y. Jan. 25, 1983) (quoted in *Anschuetz*, 754 F.2d at 613 n.28 and *Laker*, 103 F.R.D. at 49).¹

On the other side of the judicial coin are the opinions of a few courts which have required compliance with the Hague Convention. In *Volkswagenwerk A. G. v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1982), the plaintiff in the originating case sought inspection of defendant's German plant and production of documents and other discovery in Wolfsburg, West Germany. The California Court of Appeals decided on the basis of international comity and judicial restraint that plaintiffs had to comply with the Hague Convention in obtaining this discovery

¹ Other cases of note on this issue, but not addressing the Hague Convention argument specifically: *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) ("Once personal jurisdiction over the person and control over the documents by the person are present, a United States court has power to order production of the documents. The existence of a conflicting foreign law which prohibits the disclosure of the requested documents does not prevent the exercise of this power."); *La Chemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 604 (D. Del. 1971) ("There is no affidavit in the record indicating the bulk or cost of shipping the documents here and really no factual basis on which the Court may sustain [the objection to production of documents located in France]. It would appear offhand that shipping the documents to the United States would entail less expense than attorneys making the trip to France for such discovery."); see also *Murphy v. Reifenhauer KG Maschinenfabrik*, 101 F.R.D. 360, 363 ("[C]omity [in the legal sense . . . the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation] does not require plaintiff [administrator of estate of son who was killed by a machine made by defendant] to proceed first under the Convention in this case, particularly at this relatively late stage of discovery, and particularly where it appears that a request for production of documents under the Convention would be futile." . . . We need not attribute defendant's delay in raising this issue to bad faith in order to find that this case should not be further prolonged for many months in order to accommodate a somewhat hypothetical conflict between ordinary American discovery and German sovereignty.").

which was within the German courts' "judicial sovereignty." *Id.* at 853, 176 Cal. Rptr. at 881. Similarly, in *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982), the court vacated an order in a products liability action which required the defendant West German corporation to answer written interrogatories without compliance with the Hague Convention. This determination was also based on the "supremacy" of the Hague Convention as federal over state law (California Rules of Civil Procedure) and "in exercise of judicial restraint based on international comity." *Id.* at 245, 186 Cal. Rptr. at 880. In denying a motion to compel answers to interrogatories and to produce documents, the District Court for the Eastern District of Pennsylvania required the plaintiff to comply with the Hague Convention. *Philadelphia Gear Corp. v. American Pfauter Corp. & BHS-Dr. Ing. Hofler GmbH*, 100 F.R.D. 58 (E.D. Pa. 1983). In coming to this decision, the court relied on the California cases, stating:

To allow the forum court to supplement the convention with its own practices would not promote uniformity in the gathering of evidence nor generate a spirit of cooperation among signatories to the treaty. . . . Obviously, to permit one sovereign to foist its legal procedures upon another whose internal rules are dissimilar would run afoul of the interests of sound international relations and comity.

Id. at 60. In a footnote, the court found no merit in plaintiff's argument that because defendant had served discovery requests pursuant to the Federal Rules of Civil Procedure, it should be estopped from asserting the applicability of the Hague Convention. "The Convention is at issue only when a litigant from a signatory country seeks evidence in another signatory country other than where the case is pending. Hofler's request did not seek to take any evidence abroad. It was directed to a party residing in the country where the litigation was initiated." *Id.* at 61 n.5.

These cases were distinguished in *Graco v. Kremlin, Inc.*, 101 F.R.D. 503, 517-24 (N.D. Ill. 1984). The *Graco* court noted that in *Volkswagenwerk*, discovery orders involving formal discovery proceedings to be conducted in West Germany were involved,

which would call for application of the Hague Convention. *Pierburg*, which involved only written interrogatories to a West German defendant, was, in the opinion of the *Graco* court, not well reasoned and distinguishable from *Volkswagenwerk*, upon which the *Pierburg* court relied. *Graco*, 101 F.R.D. at 518-19. *Philadelphia Gear*, the *Graco* court noted,

cites the Convention's purpose of promoting mutual judicial cooperation, apparently associating this notion also with principles of comity. . . . International judicial cooperation is, however, or at least should be, an extraordinary measure, employed to protect the sovereign interests of another country when those interests truly are implicated. Trying (or pre-trying) a case in two different countries' courts is not a desirable way of handling routine litigation. Involving two judicial systems in a single lawsuit is as likely to disrupt international relations as it is to promote them, especially when the two systems are brought together for discovery purposes.

Id. at 523. Examining Article 23 of the Convention, which permits a state to refuse to execute a letter rogatory issued to obtain pretrial discovery of documents, the *Graco* court concluded that such a broad interpretation as the *Philadelphia Gear* court gave would give foreign courts power over the conduct of litigation in American courts:

Either American courts would surrender jurisdiction by treating the decisions of foreign authorities as final and unreviewable, or they would invite endless motions and real international friction by second-guessing those decisions. The court cannot understand why a requirement making such judicial cooperation routine should be inferred from a treaty containing very little language to justify its inference, and the court also does not believe that principles of international comity demand (or are served by) such a requirement.

Id. at 524. The court did not require *Graco* to proceed only under the Convention, emphasizing that it was not ordering that any proceeding be conducted within France.

Defendants argue that they are caught in a legal "Catch-22" in that, by French statute, they are subject to penalty if they provide commercial information to foreign public entities without complying with the Hague Convention. French Penal Code, Law No. 80-538, Articles 1 and 1-*bis*. At the same time defendants are subject to sanctions by American courts if they fail to cooperate in discovery.

The French law in question was originally "inspired to impede enforcement of United States antitrust laws," but was phrased without a requirement that antitrust law be involved. See Toms, *The French Response to Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, 586, (1981). The provision of the law in question here is Article 1-*bis* which provides:

Subject to any treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings.

Toms, *supra* at 611. Violation of this section is punishable by a prison term of two to six months and/or a fine of 10,000 to 120,000 Francs. French Penal Code, Law No. 80-538, Article 3. Article 1-*bis*' application is limited to discovery within French territory, Toms, *supra* at 595, and a party who is affected by the law may seek a waiver of its provisions from the appropriate French minister, to whom they are to report such requests. French Penal Code, Law No. 80-538, Article 2; see *Soletanche and Rodio v. Brown and Lambrecht*, 99 F.R.D. 269, 271 (N.D. Ill. 1983) (holding compliance with court's discovery order would not impose "too great a burden" on plaintiffs as they were only being required to contact the appropriate minister, as required by law, and request a waiver). It appears that Articles 1 and 1-*bis* have not been strictly enforced in France, see Toms, *supra* at 599 and 605. The Toms article also notes that "the legislative history [of the Law] shows only that the Law was adopted to protect

French interests from abusive foreign discovery procedures and excessive assertions of extraterritorial jurisdiction. Nowhere is there an indication that the Law was to impede litigation preparations by French companies, either for their own defense or to institute lawsuits abroad to protect their interests, and arguably such applications were unintended." Toms, *supra* at 598.

The "Catch-22" situation which defendants face has been addressed by the federal district court sitting in the Northern District of Illinois on at least two occasions. In *Soletanche and Rodio v. Brown and Lambrecht*, the court ordered plaintiff French corporations to answer interrogatories and produce documents in spite of Law No. 80-538 and potential criminal liability. 99 F.R.D. 269 (N.D. Ill. 1983).

As the Seventh Circuit recently stated, "the fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production." (Citations omitted). In doing so, however, the court is required to engage in a sensitive balancing of the competing interests at stake in compelling such production. . . .

... [T]he factors to consider in balancing competing interests . . . are: vital national interests of each of the states; the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; the extent to which the required conduct is to take place in the territory of the other state; the nationality of the person; and the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Id. at 271. See also *Graco v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984) for a discussion of the problems created by Article 1-*bis*.

The vital national interest in this case is protection of United States citizens from harmful foreign products and compensation for injuries caused by such products. France's interest is protection of their citizens from intrusive foreign discovery procedures; however, it does not appear that France has strictly enforced the

law. Defendants face no extraordinary hardship at this point as it is not clear that the law will be strictly enforced against them. The required conduct does not have to take place in France as the interrogatories can be answered in the United States and the documents requested produced there. The defendants are French national corporations. The final factor does not come into consideration here as the Court is not at this stage concerned with enforcement of discovery orders.

III. CONCLUSION

Based on the foregoing discussion, this Court denies the defendants' motion for protective order insofar as it relates to answering interrogatories, producing documents and making admissions. This decision is based on the Court's concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts and the potential interference with such proceedings which forcing compliance with foreign court procedures would cause.

If interpreted as preempting routine interrogatories and document requests, the Convention really would be much more than an agreement on taking evidence abroad, which is what it purports to be. Instead, the Convention would amount to a major regulation of the overall conduct of litigation between nationals of different signatory states, raising a significant possibility of very serious interference with the jurisdiction of the court in which the litigation is begun. The solicitude for the judicial sovereignty of civil law countries shown in *Schroeder*, *Philadelphia Gear*, and *Pierburg* apparently is unmatched by any recognition that they are suggesting a startling limitation on the sovereign powers of this country, as expressed through its courts. Treating the Convention procedures as exclusive would make foreign authorities the final arbiters of what evidence may be taken from their nationals, even when those nationals are parties properly within the jurisdiction of an American court.

Graco, 101 F.R.D. at 521-22. This Court is not dealing with a conflict between state rules of civil procedure and a treaty, but

with a conflict between two essentially equal federal laws. To permit the Hague Evidence Convention to override the Federal Rules of Civil Procedure would frustrate the courts' interests, which particularly arise in products liability cases, in protecting United States citizens from harmful products and in compensating them for injuries arising from use of such products. As to defendants' argument of illegality, this Court determines that the United States' interests are stronger than potential French interests, given no strong evidence that Law No. 80-538 is strictly enforced. The conduct to be ordered does not have to take place in France and the procedures to be ordered are not greatly intrusive or abusive.

For these reasons, the Court orders discovery as follows:

1. Defendant shall answer the interrogatories propounded by plaintiffs and respond to plaintiffs' request for admissions and for production of documents on or before October 1, 1985.
2. If discovery depositions are to be undertaken, the Court will require compliance with the Hague Evidence Convention if such depositions are to be conducted in France, based on the Court's understanding of the current law.

IT IS SO ORDERED.

Dated this 31st day of July, 1985.

/s/ R. E. LONGSTAFF
R. E. Longstaff
U.S. Magistrate

Appendix C

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

CHAPTER I—LETTERS OF REQUEST

ARTICLE 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

ARTICLE 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority or another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

ARTICLE 3

A Letter of Request shall specify—

- (a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- (d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, *inter alia*—

- (e) the names and addresses of the persons to be examined;
- (f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;
- (g) the documents or other property, real or personal, to be inspected;
- (h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
- (i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

ARTICLE 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

ARTICLE 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

ARTICLE 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent

forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

ARTICLE 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

ARTICLE 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

ARTICLE 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

ARTICLE 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

ARTICLE 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

ARTICLE 12

The execution of a Letter of Request may be refused only to the extent that—

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

ARTICLE 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

ARTICLE 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II—TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

ARTICLE 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

ARTICLE 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the

area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if—

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permissions.

ARTICLE 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

ARTICLE 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

ARTICLE 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

ARTICLE 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence—

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

ARTICLE 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III—GENERAL CLAUSES

ARTICLE 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

ARTICLE 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

ARTICLE 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall

have exclusive competence to execute Letters of Request pursuant to this Convention.

ARTICLE 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

ARTICLE 27

The provisions of the present Convention shall not prevent a Contracting State from—

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

ARTICLE 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from—

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

ARTICLE 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905¹ and the 1st of March 1954,² this Convention shall replace Articles 8-16 of the earlier Conventions.

ARTICLE 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

ARTICLE 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

ARTICLE 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions contain-

¹ 99 *British Foreign and State Papers* 990.

² 286 UNTS 265.

ing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

ARTICLE 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

ARTICLE 34

A State may at any time withdraw or modify a declaration.

ARTICLE 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following—

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

ARTICLE 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

ARTICLE 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of the Organization, or a Party to the Statute of the International Court of Justice¹ may accede to the present

¹ TS 993; 59 Stat. 1055.

Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

ARTICLE 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.¹

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

¹ Extended to Guam, Puerto Rico, and the Virgin Islands pursuant to notification sent by the American Embassy at The Hague on Feb. 6, 1913.

ARTICLE 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

ARTICLE 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following—

- (a) the signatures and ratifications referred to in Article 37;
- (b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
- (c) the accessions referred to in Article 39 and the dates on which they take effect;
- (d) the extensions referred to in Article 40 and the dates on which they take effect;
- (e) the designations, reservations and declarations referred to in Articles 33 and 35;
- (f) the denunciations referred to in the third paragraph of Article 41.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channels, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

Appendix D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 33. Interrogatories to Parties

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers and objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

RULE 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and

upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

RULE 36. Requests for Admission

(1) **Requests for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been

or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final

disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

Appendix E

Translated from the French

July 17, 1980 OFFICIAL JOURNAL OF THE FRENCH
REPUBLIC 1979

LAWS

ACT 80-538 of July 16, 1980 relative to disclosure of economic, commercial or technical documents and data to natural persons or legal entities.

The National Assembly and the Senate have adopted,

The President of the Republic promulgates the following Act:

Art. 1. The title of Act 68-678 of July 26, 1968 relative to disclosure of documents and information to foreign authorities in the field of maritime commerce is amended to read:

"Act relative to disclosure of economic, commercial, industrial, financial or technical documents and data to natural persons or legal entities".

Art. 2. I—Article 1 of Act 68-678 of July 26, 1968 aforesaid is worded as follows:

"Art. 1. Subject to treaties or international agreements, it is prohibited for any natural person of French nationality or habitually residing in French territory and for any executive, representative, employee or agent of a legal entity having its registered office or an establishment therein to disclose in writing, orally or otherwise, in any place, to foreign public authorities, economic, commercial, industrial, financial or technical documents or data disclosure of which is liable to infringe the sovereignty, security, essential economic interests of France or public policy, specified by the administrative authorities if need be".

II—Article 1A reading as follows is inserted after article 1 of Act 68-678 of July 26, 1968 aforesaid:

"Art. 1A. Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic,

commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith".

Art. 3. Article 2 of Act 68-678 of July 26, 1968 aforesaid is amended to read:

"Art. 2. The parties mentioned in articles 1 and 1A shall forthwith inform the competent minister if they receive any request concerning such disclosures".

Art. 4. Article 3 of Act 68-678 of July 26, 1968 aforesaid is amended to read:

"Art. 3. Without prejudice to heavier penalties prescribed by law, any breach of articles 1 and 1A of this Act shall be punished by imprisonment for two to six months and a fine of 10,000 to 120,000 F or either".

This Act shall be executed as a State law.

Paris, July 26, 1980.

Signed by Valéry Giscard D'Estaing, President of the Republic, Raymond Barre, Prime Minister, Alain Peyrefitte, Minister of Justice, Jean François Poncet, Foreign Minister, René Monory, Minister of the Economy, André Giraud, Minister of Industry, Joël Le Theule, Minister of Transportation, Jean-François Deniau, Minister of Foreign Trade and Maurice Charretier, Minister of Commerce and Crafts.

[Seal]

LOIS

LOI n° 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères (1).

L'Assemblée nationale et la Sénat ont adopté,

Le Président de la République promulgue la loi dont la teneur suit:

Art. 1^{er}— Le titre de la loi n° 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements à des autorités étrangères dans le domaine du commerce maritime est modifié ainsi qu'il suit:

"Loi relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères."

Art. 2. — I. — L'article 1^{er} de la loi n° 68-678 du 26 juillet 1968 susvisée est ainsi rédigé:

"Art. 1^{er}— Sous réserve des traités ou accords internationaux, il est interdit à toute personne physique de nationalité française ou résidant habituellement sur le territoire française et à tout dirigeant, représentant, agent ou préposé d'une personne morale y ayant son siège ou un établissement de communiquer par écrit, oralement ou sous toute autre forme, en quelque lieu que ce soit, à des autorités publiques étrangères, les documents ou les renseignements d'ordre économique, commercial, industriel, financier ou technique dont la communication est de nature à porter atteinte à la souveraineté, à la sécurité, aux intérêts économiques essentiels de la France ou à l'ordre public, précisés par l'autorité administrative en tant que besoin."

II. — Il est inséré, après l'article 1^{er} de la loi n° 68-678 du 16 juillet 1968 susvisée, un article 1^{er} bis ainsi rédigé:

"Art. 1^{er} bis. — Sous réserve des traités ou accords internationaux et des lois et règlements en vigueur, il est interdit à toute

personne de demander, de rechercher ou de communiquer, par écrit, oralement ou sous toute autre forme, des documents ou renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci."

Art. 3. — L'article 2 de la loi n° 68-678 du 26 juillet 1968 susvisée est ainsi modifié:

"Art. 2. — Les personnes visées aux articles 1^{er} et 1^{er bis} sont tenues d'informer sans délai le ministre compétent lorsqu'elles se trouvent saisies de toute demande concernant de telles communications."

Art. 4. — L'article 3 de la loi n° 68-678 du 26 juillet 1968 précitée est ainsi modifié:

"Art. 3. — Sans préjudice des peines plus lourdes prévues par la loi, toute infraction aux dispositions des articles 1^{er} et 1^{er bis} de la présente loi sera punie d'un emprisonnement de deux mois à six mois et d'une amende de 10 000 F à 120 000 F ou de l'une de ces deux peines seulement."

La présente loi sera exécutée comme loi de l'Etat.

Fait à Paris, le 16 juillet 1980.

VALÉRY GISCARD D'ESTAING.

Par le Président de la République:

Le Premier ministre,

RAYMOND BARRE.

Le garde des sceaux, ministre de la justice,

ALAIN PEYREFITTE.

Le ministre des affaires étrangères,

JEAN FRANÇOIS-PONCET.

Le ministre de l'économie,

RENÉ MONORY.

Le ministre de l'industrie,

ANDRÉ GIRAUD.

Le ministre des transports,

JOËL LE THEULE.

Le ministre du commerce extérieur,

JEAN FRANÇOIS DENIAU.

Le ministre du commerce et de l'artisanat,

MAURICE CHARRETIER.

APPENDIX F

Ambassade de France aux Etats-Unis
Washington, D.C.

Novembre 1985

L'Ambassade de France présente ses compliments au Département d'Etat et, se référant à la note de l'Ambassade du 4 août 1985, a, sur instruction de son Gouvernement, l'honneur de lui faire savoir ce qui suit.

Dans sa note précitée, l'Ambassade avait appelé l'attention des autorités américaines sur le vif désir des autorités françaises de voir la Cour Suprême des Etats-Unis accepter d'examiner le recours de deux sociétés allemandes, Anschuetz et Cie et Messerschmitt Bolkow Blohm, en raison des implications directes que ces deux affaires ont sur l'interprétation et l'application de la Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale.

Les autorités françaises souhaitent souligner à nouveau l'importance qui s'attache au respect de la convention du 18 Mars 1970, qui constitue, dans les relations entre les Etats parties, le seul moyen juridique pour obtenir des preuves en matière civile ou commerciale pour les nécessités d'une procédure judiciaire.

Elles rappellent tout d'abord que l'entraide judiciaire internationale ne peut s'exercer que dans le respect de la souveraineté de chaque Etat et plus particulièrement du principe de la territorialité des lois qu'en conséquence le fait pour une autorité judiciaire d'un Etat d'exiger la communication de documents ou de renseignements se trouvant placés sous la juridiction d'un Etat étranger, sans l'autorisation de ce dernier et sans respecter les procédures en vigueur dans cet Etat, constitue, au regard du droit international, une atteinte à la souveraineté dudit Etat.

C'est pour éviter cet écueil et pour permettre l'établissement d'une nécessaire coopération en matière judiciaire entre Etats souverains qu'a été conclue la Convention de la Haye du 18 mars 1970. Un examen du texte de cette convention montre clairement que les demandes d'obtention de preuves civiles ou commerciales par une autorité judiciaire d'un Etat partie à la convention sur le territoire d'un autre Etat également partie ne sont recevables par la partie requise que si ces demandes sont formulées dans le respect des conditions strictes établies par la convention, ce qui constitue une reconnaissance de la souveraineté judiciaire de l'Etat requis.

L'article 27 de la Convention confirme encore cette conception :

Cet article stipule que les dispositions de la présente convention ne font pas obstacle à ce qu'un Etat contractant :

c) permette, aux termes de sa loi ou de sa coutume interne, des méthodes d'obtention de preuves autres que celles prévues par la présente convention.

Cette formulation négative prouve que la recherche de preuves civiles ou commerciales par des moyens non prévus par la convention est effectivement subordonnée au consentement de l'Etat requis. Elle signifie, en défini-

tive, que tout ce qui n'est pas expressément prévu par la convention ou par la législation de l'Etat requis est interdit.

Il apparaît ainsi que la Convention du 18 mars 1970, est, à défaut d'une autorisation explicite de l'Etat requis, le passage obligé pour obtenir entre Etats parties des preuves en matière civile ou commerciale en vue de procédures judiciaires.

Les autorités françaises souhaitent en outre souligner que le Parlement français a voté le 16 juillet 1980 une loi qui interdit la recherche de documents ou renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci. Toutefois cette loi réserve l'application des procédures prévues par les accords internationaux auxquels la France est partie et valorise ainsi ces accords, tout particulièrement la convention de La Haye.

C'est pour toutes ces raisons que les autorités françaises considèrent qu'il est dans l'intérêt commun de veiller au respect des dispositions de la Convention de La Haye. Elles réitèrent en conséquence auprès du Département d'Etat leur souhait de voir la Cour Suprême des Etats-Unis accepter les deux recours sus-mentionnés.

L'Ambassade de France saisit cette occasion pour renouveler au Département d'Etat les assurances de sa très haute considération.

DEPARTMENT OF STATE
DIVISION OF LANGUAGE SERVICES

(Translation)

LS NO. 118204
RHC/MM
French

Embassy of France in the United States

Washington, November 23, 1985

The Embassy of France presents its compliments to the Department of State and, in reference to the Embassy's note of August 4, 1985, on instructions of its Government, has the honor to inform it of the following:

In the aforementioned note, the Embassy called to the attention of the United States authorities the strong wish of the French authorities that the United States Supreme Court agree to examine the appeal of two German firms, Anschuetz and Co. and Messerschmitt Bolkow Blohm, because of the direct implications that these two cases have on the interpretation and application of the Hague Convention of March 18, 1970, on the taking of evidence abroad in civil or commercial matters.

The French authorities wish to reiterate the importance they attach to compliance with the Convention of March 18, 1970, which constitutes, in relations between the States parties, the only legal means of obtaining evidence in civil or commercial matters for the requirements of a judicial procedure.

They recall first that international judicial assistance can take place only with respect for the sovereignty of each State and particularly for the principle of the territoriality of laws, and consequently for a judicial authority of one State to demand the production of documents or information that are under the jurisdiction of a foreign State, without its authorization and without respecting the procedures in force in that State, would constitute under international law an infringement of the sovereignty of that State.

It was in order to avoid this difficulty and make it possible to establish the necessary cooperation in judicial matters between sovereign States that The Hague Convention of March 18, 1970, was concluded. An examination of the text of this Convention clearly shows that requests for the production of civil or commercial evidence by a judicial authority of a State party to the Convention in the territory of another State party are not admissible by the requested Party unless such requests are formulated in conformity with the strict conditions established by the Convention, which constitutes recognition of the judicial sovereignty of the requested State.

Article 27 of the Convention reconfirms this concept:

This article stipulates that the provisions of the present Convention shall not prevent a Contracting State from:

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

This negative wording proves that the search for civil or commercial evidence by means not covered by the Convention is indeed dependent upon the consent of the requested State. In the final analysis, it means that whatever is not expressly covered by the Convention or by the laws of the requested State is prohibited.

Thus it appears that the Convention of March 18, 1970, in the absence of explicit authorization by the requested State, is the obligatory channel for obtaining evidence between States parties in civil or commercial matters for purposes of legal procedures.

The French authorities also wish to emphasize that on July 16, 1980, the French Parliament enacted a law that prohibits the search for documents or information of an economic, commercial, industrial, financial, or technical nature for the purpose of compiling evidence for foreign judicial or administrative procedures or in the context of such procedures. However, this law retains the application of the procedures provided for in the international agreements to which France is party and thus confirms such agreements, particularly The Hague Convention.

For all these reasons the French authorities consider it in the common interest to ensure that the provisions of The Hague Convention are respected. Consequently they reiterate to the Department of State their wish to have the United States Supreme Court hear the two aforementioned appeals.

[Complimentary close]

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(2)
No. 85-1895

Supreme Court, U.S.

FILED

MAY 16 1986

JOSEPH E. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1985

— o —
**SOCIETE NATIONALE INDUSTRIELLE
AEROSPATIALE and SOCIETE DE CONSTRUCTION
D'AVIONS DE TOURISM,**

Petitioners,

v.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,**

Respondent.

**(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties In Interest)**

— o —
**BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**
— o —

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May 16, 1986

QUESTIONS PRESENTED

1. Does the limited issue presented for review by the Petitioners sufficiently meet the criteria established by Supreme Court Rules 17 and 18 to justify review at this stage of the proceedings?

2. Is it proper to grant review on writ of certiorari where the record below reveals that the case is not ripe for review and where the court cannot render any meaningful relief if it adopts Petitioners' reasoning?

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No. 85-1695

—o—
In The
Supreme Court of the United States
October Term, 1985
—o—

SOCIETE NATIONALE INDUSTRIELLE
AEROSPATIALE and SOCIETE DE CONSTRUCTION
D'AVIONS DE TOURISM,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,

Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties In Interest)

—o—
**BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**
—o—

Respondents request that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit be denied. This case raises similar issues to *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98) and *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729

(5th Cir. 1985) *cert. granted*, 54 U.S.L.W. 3686 (U.S. April 22, 1986) (No. 85-99). However, Respondents believe that the issues are distinguishable, and that the lower courts have previously decided the same issues herein consistently, so that the petition should be denied and this case allowed to proceed.

OPINIONS BELOW

The opinion of the court of appeals is reported at 754 F.2d 120; the order of the magistrate (Appendix B) is unreported.

STATUTORY AND TREATY PROVISIONS INVOLVED

This case concerns the construction and purpose of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974) ("Hague Evidence Convention") and the interplay between the Hague Evidence Convention, the Federal Rules of Civil Procedure, and French Penal Code Law No. 80-538. The Hague Convention is reproduced as Appendix C. Rules 33, 34 and 36 of the Federal Rules of Civil Procedure are reproduced as Appendix D. French Penal Code Law No. 80-538 ("French Blocking Statute") and an official translation thereof are reproduced as Appendix E. For the purposes of this petition, Rules 17 and 18 of

the Supreme Court of the United States, reproduced at Appendix A, also apply.

STATEMENT

This case presents the narrow issue of whether a United States District Court can order a party over whom it has personal jurisdiction to answer interrogatories and respond to requests for production, even when that party must resort to sources located abroad, where the discovery requests are filed and served in this country and the responses are due in this country. The opposing viewpoint is that the Hague Evidence Convention, and ancillary statutes in the various signatory nations, essentially control the discovery proceedings in American courts when one of the parties happens to be a foreign national.

The Convention governs the "taking of evidence abroad", as the title indicates, and provides a procedure, known as "Letters of Request", whereby the party seeking the evidence may solicit the appropriate authority in another signatory nation "to obtain evidence, or to perform some other judicial act." (Art. I, App. C at 21). The Letter of Request must specify certain facts, including the names and addresses of the persons to be examined, the questions or subject matter for the examination, and the documents or other real or personal property to be inspected. (Art. 3, App. C at 22).

The petitioners in the instant case are French corporations. France is a signator to the Convention. Petitioners' documents and records are purportedly all located in France. France also has a blocking statute, which by its terms appears to prohibit disclosure of certain classes of documents or information in connection with foreign legal proceedings unless done in compliance with

international agreements, in this case, the Convention. (App. E at 46, 47). The petitioners claim they will be subject to criminal penalties if they comply with the discovery requests.

Although the petitioners are French corporations, they sought access to American markets for their products, as the claims in this case arose from a plane crash near New Virginia, Iowa, on August 19, 1980. The plaintiffs filed suit in the United States District Court for the Southern District of Iowa, and have alleged that the plane manufactured by petitioners was defective. Plaintiffs seek damages for personal injuries on product liability, negligence, and breach of implied warranty theories.

In April and June, 1985, plaintiffs served on petitioners several requests for admissions, a request for production of documents, and a set of interrogatories. In response to plaintiffs' discovery requests, petitioners sought a protective order to require that discovery be conducted in accordance with the provisions of the Hague Evidence Convention. They informed the court that, to the extent they had documents or information responsive to these requests, they are located in France and that their disclosure is prohibited by French law except in accordance with the Convention. The motion for a protective order was denied. The magistrate explained that his decision was based on "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts." App. B at 19.

Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism petitioned the court of appeals for a writ of mandamus to review the

magistrate's order. The court of appeals agreed to consider the petition on the merits and held that the Hague Evidence Convention does not apply to the discovery requests here in question. It stated:

Although a minority of courts have adopted the position advanced by the Petitioners, in our opinion the better rule, which has been adopted by the vast majority of courts, is that when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention. 782 F.2d at 124.

Recognizing that this rule would severely restrict the Convention's scope, the court observed that "the Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign non-parties who are not subject to an American court's jurisdiction and compulsory powers." 782 F.2d at 125.

The court then turned its attention to the French Blocking Statute which, in light of its earlier ruling that the Convention does not apply, the court treated as an independent ground for petitioners' objections to compliance with the discovery orders. On the basis of *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), and its progeny, the court found that considerations of comity do not require any deference to the French Blocking Statute. 782 F.2d at 126-27. Accordingly, it ordered that discovery proceed. 782 F.2d at 127.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because this case does not yet raise issues for which review is necessary. Where the issue has been considered there is great consistency among federal courts. There is no conflict or imposition upon the sovereignty of foreign nations where legal or judicial proceedings are not being conducted within their borders. However, if petitioners' reasoning is adopted, foreign nations, through the passage of ancillary statutes or their own interpretation of the Convention, could remove control over the discovery process from the United States district courts.

I.

The limited issue of whether a district court can order a party over which it has personal jurisdiction to respond to interrogatories and requests for production in this country, even if that party must resort to sources or information located abroad, does not meet the criteria established by Supreme Court Rules 17 and 18 for review.

Petitioners herein have requested the Court to exercise its discretion to review on writ of certiorari the issues stated in their Petition. Notably absent from their Petition is any discussion or showing why the writ should be granted, in view of the criteria established by Supreme Court Rules 17 and 18.¹ Respondents contend that the criteria are not met by this case, and the writ should accordingly be denied.

1. SUP. CT. R. 17; SUP. CT. R. 18. The text of these Rules is reproduced at Appendix A to this Brief.

Rule 18 provides that a petition for writ of certiorari "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court."² The instant case is still in the early stages of discovery. The Respondents, plaintiffs below, have served Interrogatories and a Request For Production Of Documents upon Petitioners, who are the defendants below. The district court has personal jurisdiction over the Petitioners, who have objected to complying with the discovery requests on the grounds that they are French corporations, and compliance will require them to produce documents or obtain interrogatory responses from sources in France. Petitioners assert the Hague Convention³ is the sole medium of discovery for Respondents, notwithstanding the decisions of various federal district courts and the Fifth Circuit to the contrary.⁴

The Convention became effective between the United States and France in 1974, and dates to 1970⁵. In its decision in *In Re Anscheutz & Co., GmbH*⁶ the Fifth Circuit stated "this is the first time a circuit court has considered the interplay between the Hague Convention and the Fed-

2. SUP. CT. R. 18.

3. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974).

4. See notes 11-19, *infra*, and accompanying text.

5. See note 3, *supra*.

6. 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98).

eral Rules. . . .'⁷ In addition, the number of decisions directly addressing this issue is a relative handful.⁸ Finally, only the Fifth Circuit, and now the Eighth Circuit, have considered this issue, and their decisions are not in conflict.⁹ If this discovery issue was of "imperative public importance" one would expect more decisions in view of the length of time the treaty has been in effect. The paucity of appeals and decisions indicates that discovery disputes are either resolved or never arise. For this Court to devote time and attention to this issue at this time is not justified.

The provisions of Rule 17, which are reproduced in full at Appendix A, suggest that a conflict between the federal courts of appeal or a conflict between a state court of last resort and a federal court of appeal, or an undecided question of federal law, or a substantial departure from the accepted and usual course of judicial proceedings are considerations for the Court in determining whether to grant or deny a writ.¹⁰ The latter has not even been sug-

7. *Id.* at 605.

8. See Petitioners' Brief at 11, n. 22 and 23, at 12, n. 24. Petitioners cite nineteen cases. Magistrate Longstaff cited approximately seven cases on the direct issue, and the Eighth Circuit did likewise. The cases relied upon by the Eighth Circuit and Magistrate Longstaff are among those cited by Petitioners.

9. See *In re Anschuetz & Co., GmbH*, *supra* note 6; *In re Messerschmitt Bolkow Blohm, GmbH*, 757 F.2d 729 (5th Cir. 1985), cert. granted, 54 U.S.L.W. 3686-87 (U.S. April 22, 1986) (no. 85-99); *In re Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism*, 782 F.2d 120 (8th Cir. 1986), petition for cert. filed, — U.S.L.W. — (U.S. April 16, 1986) (No. 85-1695).

10. SUP. CT. R. 17; App. A at 1.

gested by the Petitioners, so the first three must be considered to determine whether there exist any grounds for granting the writ at this time.

The Fifth Circuit has issued two decisions, *In re Anschuetz & Co., GmbH*¹¹ and *In re Messerschmitt Bolkow Blohm, GmbH*¹². The Eighth Circuit has now issued its decision in the instant case. *In re Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism*.¹³ Instead of the "sharp division among the lower courts" claimed by the Petitioners, there is no conflict between published decisions of federal courts of appeal. In addition, the district courts in the D.C.¹⁴, Second¹⁵, Third¹⁶, Sixth¹⁷, Seventh¹⁸, and Eighth¹⁹ Circuits

11. See note 6, *supra*.

12. See note 9, *supra*.

13. *Id.* Petitioners in their Brief, at 5, n. 3, dispute the Eighth Circuit's assertion that the vast majority of courts have adopted a similar result. If so, the District Court in New York has made the same error as the Eighth Circuit. *Compagnie Francaise D'assurance v. Phillips Petroleum*, 105 F.R.D. 16, 27 (S.D.N.Y. 1984) (weight of judicial authority clearly to contrary of argument that Hague Convention is exclusive means of discovery evidence abroad).

14. *Work v. Bier*, 106 F.R.D. 45 (D.D.C. 1985); *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984).

15. *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435 (S.D.N.Y. 1984); *Murphy v. Reifenhauer KG Maschinenfabrik*, 101 F.R.D. 360 (D. Vt. 1984).

16. *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983).

17. *Lowrance v. Michael Weinig, GmbH & Co.*, 107 F.R.D. 386 (W.D. Tenn. 1985).

18. *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill., 1984).

19. *Testirion, Inc. v. Skoog*, Civil No. 4-84-911, slip op. (D.C. Minn. 8-9-85).

have reached similar results. There are, to be sure, contrary decisions, including district court decisions which appear to conflict in the Third and Seventh Circuits²⁰. However, Respondents believe the narrow issue involved here is distinguishable, and the apparent conflict is just that—apparent and not real.

It is important to note the real and limited issue presented here. That is, may a district court order a foreign defendant over whom it has personal jurisdiction to respond to interrogatories and requests for production in the United States, even if the defendant must resort to sources or information located abroad? Thus stated, the answer and the cases are in the affirmative.

The well-reasoned decision in *Graco, Inc. v. Kremlin, Inc.*²¹, which drew the distinction presented here has been often quoted and cited by subsequent cases.²² Judge Getzendanner noted that two of the leading cases applying the convention, *Schroeder v. Lufthansa German Airlines*²³ and *Philadelphia Gear Corp. v. American Pfauter Corp.*,²⁴ “relied heavily on two decisions of the California Court

20. *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Schroeder v. Luftansa German Airlines*, 18 Av. Cas. (CCH) 17,222 (N.D. Ill. 1983). See also Petitioners’ Brief, at 11, n. 23, and cases cited therein.

21. 101 F.R.D. 503 (N.D. Ill. 1984).

22. See *Anschuetz*, 754 F.2d at 610-11; *Societe Nationale*, 782 F.2d at 124-25; *Lowrance*, 107 F.R.D. at 388; *Work*, 106 F.R.D. at 51; *Compagnie Francaise*, 105 F.R.D. at 27; *Slauenwhite v. Bekum Maschinenfabriken, BmbH*, 104 F.R.D. 616, 617-18 (D. Mass. 1985).

23. 18 Av. Cas. (CCH) 17,222 (N.D. Ill. 1983).

24. 100 F.R.D. 58 (E.D. Pa. 1983).

of Appeal. . . .’²⁵. In particular, the California case of *Volkswagenwerk A.G. v. Superior Court*,²⁶ was viewed by Judge Getzendanner as “the seminal case in this field. . . .’²⁷ In *Volkswagenwerk*, the lower court ordered on-site inspection to be conducted in Wolfsburg, F.R.G. This is clearly distinguishable from the instant case, and to the extent the subsequent cases relied upon *Volkswagenwerk* as authority, Judge Getzendanner rejected their holdings.²⁸ Finally, in order to dispel any doubt about his ruling ordering responses to interrogatories and requests for production, he stated “[t]he court emphasizes that it is not ordering any proceeding be conducted within France.”²⁹

Respondents believe that instead of a conflict, the courts considering the same issue presented here have been very consistent. When discovery moves into the realm of depositions or on-site inspections that may well involve application of the Hague Convention, and in fact, Magistrate Ronald E. Longstaff ruled: “2. If discovery depositions are to be undertaken, the Court will require compliance with the Hague Evidence Convention *if such depositions are to be conducted in France*, based upon the Court’s understanding of the current law.”³⁰

25. 101 F.R.D. at 517.

26. 123 Cal. App.3d 840, 176 Cal. Rptr. 874 (1981).

27. 101 F.R.D. at 518.

28. 101 F.R.D. at 518-19.

29. *Id.* at 524.

30. *Jones v. Societe Nationale Industrielle Aerospatiale*, Civil No. 82-453-C, Order (S.D. Iowa, July 31, 1985), at 19 (em-

Volkswagenwerk and its progeny appear to be a minority and divergent line of decisions arising primarily from state supreme courts. To the extent that federal courts have construed the federal rules of civil procedure with the Hague Convention, Respondents believe the results are similar and no conflict exists.

In the absence of any showing that the criteria suggested by Rules 17 and 18 have been met, the Petition should be denied. Petitioners assert that the issue is "a question of undeniable importance." Notwithstanding that assertion, this case, with its limited issue, does not pass muster for review.

II.

It is inappropriate to grant review on writ of certiorari where the record below reveals that the case is not ripe for review, and where a decision in favor of Petitioners will be advisory in nature and will not result in meaningful relief to the parties.

Petitioners wish to force Respondents to resort to the Hague Convention for their preliminary discovery requests. Respondents believe the Petitioners are in error regarding their assertion of the applicability of the Convention, as discussed elsewhere in this Brief. Petitioners also believe the Government of France has given clear

phasis added). Magistrate Longstaff's Order is reproduced at Appendix B. The language quoted appears at 20. The court in *Lowrance*, 107 F.R.D. 386, expressed a similar view: "Failure of defendant, over whom this court has *in personam* jurisdiction, to comply with the discovery requests will not authorize the court to order discovery in Germany. . . ." *Id.* at 389.

notice of the probable fate of such requests if the Convention is followed, and the parties will have to return to the courts to once again argue about discovery. Review at this stage would be futile.

The Convention, at Chapter III, Article 23, allows a signatory state to declare that "it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."³¹ France has made this declaration.³²

Chapter II, Article 18 of the Convention allows a signatory state to declare that it will assist diplomatic officers, consular agents or commissioners to take evidence by employing compulsion.³³ France declined to make this declaration, and further conditioned permission to take

31. See note 3, *supra*. The text of the Article is:

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Id. at Chapter III, Article 23.

32. *Graco*, 101 F.R.D. at 508.

33. See note 3, *supra*. The text of the Article is:

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Id. at Chapter II, Article 18.

evidence by diplomatic officers, consular agent or commissioners only upon a showing that the witnesses' appearance was voluntary.³⁴ Finally, the French Blocking Statute purports to prohibit the disclosure of information except pursuant to the provisions of the Hague Convention.³⁵

It could not be more clear that the Government of France, as its official policy, intends to essentially bar pre-trial discovery as known in the United States courts. It will use its own unreviewable discretion to decide what, when and where litigants will be able to obtain information necessary to prepare their case, if at all. Far from enhancing considerations of international comity, such conduct would constitute a clear disregard for the substantive and procedural laws of the United States, and result in a grossly unfair advantage for litigants who can on one hand obtain full discovery for their case, and on the other hand, block or severely circumscribe trial preparation by their opponents. As such, the Federal Rules of Civil Procedure and the French Blocking Statute will conflict regardless of what the court decides.

If such a limitation on discovery occurs, and the French laws clearly indicate its possibilities, then the parties will be forced to return to court for further discovery orders. The court will then be forced to decide, after having just decided that the Convention is the exclusive means of discovery, what rights litigants have when a foreign country in reliance upon the Convention, essentially refuses to grant discovery. Any ruling by this court

34. *Graco*, 101 F.R.D. at 508.

35. French Penal Code law No. 80-538 ("French Blocking Statute"). See Appendix E.

at this time will simply not give meaningful relief to either party.

Some courts have suggested that litigants who are not satisfied with Hague Convention procedures and compliance can return to court and request the Federal Rules of Procedure be applied,³⁶ and in fact Petitioners make this same suggestion.³⁷ This would further negatively impact upon international comity by allowing federal district courts and magistrates to pass upon the conduct of foreign governments, a policy which both the Eighth Circuit and Fifth Circuit have criticized as being "the greatest insult to a civil law country's sovereignty. . . ."³⁸

Finally, Petitioners are requesting this Court to issue what would essentially be an advisory opinion regarding the French Blocking Statute. As such, this case is not ripe for review. It is interesting to note how Petitioners argue that the Convention is or should be the exclusive means for obtaining evidence abroad, yet also suggest that the district courts may be free to disregard the Convention. However, the French Blocking Statute is the real impediment to discovery, and if parties first resort to the Convention provisions, and then seek discovery orders from the district court, the French Blocking Statute *still* remains as an im-

36. *E.g.*, *Philadelphia Gear Corp.*, 100 F.R.D. at 61.

37. See Petitioners' Brief, at 13: "principles of comity require in the present case that resort be made to the Hague Evidence Convention, at least in the first instance." (emphasis added). See also *id.* at 16.

38. *Ansuetz*, 754 F.2d at 613; *Societe Nationale*, 782 F.2d at 125-26. See also *Murphy*, 101 F.R.D. at 363 (comity does not require first resort to Convention when effort would be futile).

pediment to discovery. Petitioners' arguments are simply misdirected.

The French Blocking Statute prescribes criminal penalties for the violation of its terms.³⁹ However, the Eighth Circuit below found that the record did not reveal whether the Petitioners had notified the appropriate French Minister of the requested discovery or if they had attempted to obtain a waiver of prosecution from the French government.⁴⁰ Likewise, there is no indication of any threats to prosecute Petitioners, and there is some evidence that the law has only been enforced sporadically.⁴¹

In view of the foregoing, Petitioners' complaints regarding their possible liabilities under the blocking statute are unsupported in the record, hypothetical, and possibly nonexistent. This is clearly an instance where the court is being asked to render an advisory opinion on an unripe case.

If the Court denies the petition, and Petitioners seek a waiver from the appropriate French minister, then if the waiver is granted the entire issue is moot. If the waiver is denied, and Petitioners are threatened with actual prosecution, then the litigants and the district court can at-

39. See note 35, *supra*. The translated text provides:

"Art 3. Without prejudice to heavier penalties prescribed by law, any breach of Articles 1 and 1A of this Act shall be punishable by imprisonment for two to six months and a fine of 10,000 to 120,000 F or either."

40. *Societe Nationale*, 782 F.2d at 127.

41. *Toms, The French Response To Extraterritorial Application of United States Antitrust Laws*, 15 *Int'l Law* 585, 599, 605 (1981).

tempt to fashion an acceptable procedure for discovery. Only at that stage would this case be ready for review, and only when all avenues have been exhausted or foreclosed.

Respondents submit that this case is not ripe for review, and that because of that fact any opinion would be essentially advisory in nature. In addition, the Court cannot at this stage render meaningful relief without going beyond the narrow issues presented by the record.

CONCLUSION

The Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

RULE 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

App. 2

RULE 18. Certiorari to a federal court of appeals before judgment

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellant practice and to require immediate settlement in this Court.

App. 3

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

CIVIL NO. 82-453-C

DENNIS F. JONES,
Plaintiff,
vs.

**SOCIETE NATIONALE INDUSTRIELLE
AEROSPATIALE,**
a French Corporation, et al.,
Defendants.

JOHN GEORGE, et al.,
Plaintiffs,
vs.

SEED & GRAIN CONSTRUCTION CO.,
an Iowa Corporation, et al.,
Defendants.

[Filed July 31, 1985]

ORDER

This matter is now before the Court upon the motion for protective order filed by defendants Societe Nationale Industrielle Aerospatiale and Societe De Construction d'Avions De Tourisme on June 12, 1985. Plaintiffs filed a resistance to this motion on June 19, 1985. The parties have submitted briefs and oral arguments were presented to the Court at a hearing on Tuesday, July 16, 1985.

I. BACKGROUND

Defendants are French corporations engaged in advertising and selling aircraft and component parts in the

United States. After an accident occurred on August 19, 1980, involving an aircraft designed and manufactured by the defendants, this lawsuit was instituted. The defendants have appeared and answered and are subject to this Court's jurisdiction.

The defendants responded to plaintiff's initial requests for production in August 1983 and in return, propounded interrogatories and made requests for production to plaintiff. Plaintiff has now served interrogatories upon the defendants and additional requests for production and admissions, which defendants resist. Defendants argue that plaintiff must comply with the Hague Evidence Convention in order to properly undertake discovery in this lawsuit. Plaintiff resists, claiming in personam jurisdiction over the defendant nullifies application of the Hague Convention and, further, that the courts in this country have interpreted the Convention as applying to taking evidence abroad, not within this country.

II. APPLICABLE LAW AND DISCUSSION

The issue brought before the Court is whether the Hague Evidence Convention supplants application of the discovery procedures of the Federal Rules of Civil Procedure to foreign nationals subject to in personam jurisdiction in a U.S. court.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters provides three methods of obtaining evidence abroad: by a letter rogatory, requesting authorities in a signatory state to obtain evidence or to perform some other judicial act to obtain evidence; by notice to appear before an American con-

sulate officer or foreign officer, or by designation of a private commissioner. The Hague Convention, 23 U.S.T. 2555, TIAS No. 7444. Under the letter rogatory method, the letter of request is transmitted to the central authority of the foreign state and must specify:

- (a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- (d) the evidence to be obtained or other judicial act to be performed.

Other information as needed must also be specified, according to Article 3. 23 U.S.T. 2558-59. Letters of Request must be in the language of the authority requested to execute it or be accompanied by a translation into that language. Art. 4. France has made an authorization pursuant to Art. 33, providing that it will execute only letters in French or accompanied by a translation in French. 28 U.S.C.A. § 1635-1960, 1984 pocket part, p. 90.

While the issue of whether the Hague Convention must override the Federal Rules of Civil Procedure is not widely addressed in case law, there appears to be a split among the jurisdictions which have addressed the issue.

The most recent case resolving the issue in favor of permitting discovery is *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985). This case involved product liability claims arising out of the collision of two ferry

boats within the state of Louisiana. Anschuetz, a German corporation, was third-partied in as designer of a steering device which allegedly failed, contributing to the cause of the accident. Third-party plaintiff Gijonesa served interrogatories, requests for production and notices of depositions, to which Anschuetz responded with a motion for protective order. Upon petition for writ of mandamus, the Fifth Circuit invited amicus curiae briefs from the Federal Republic of Germany and from the U.S. Department of Justice as the question was being considered for the first time by a circuit court. In a carefully researched opinion, the court reached the conclusion that the Hague Convention would be used with

the involuntary deposition of a party conducted in a foreign country, and with the production of documents or other evidence gathered from persons or entities in the foreign country who are not subject to the court's in personam jurisdiction. The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal rules. So long as discovery is sought for the identity and qualifications of witnesses there is no basis to suggest that supplying this information amounts to obtaining evidence in Germany.

Id. at 615.

Some of the language explaining the court's rationale for this conclusion should be noted:

Anschuetz' interpretation of the treaty, taken to its logical conclusion, would give foreign litigants an extraordinary advantage in United States courts. Insofar as Anschuetz seeks discovery it would be permitted the full range of free discovery procedures provided by the Federal Rules. But when a United States ad-

versary sought discovery, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention. Further, we believe that requiring domestic litigants to resort to the Hague Convention to compel discovery against their foreign adversaries encourages the concealment of information—a result directly antithetical to the express goals of the Federal Rules and the Hague Convention which aim to encourage the flow of information among adversaries.

Id. at 606. The court rejected the argument that the Hague convention was exclusive:

“the fact that documents are situated in a foreign country does not bar their discovery.” (quoting *Cooper Industries v. British Aerospace*, 102 F.R.D. 918 (S.D.N.Y. 1984) and citing *Marc Rich & Co. v. U.S.*, 707 F.2d 663, 667 (2d Cir.) (grand jury investigation), *cert. denied*, 103 S. Ct. 3555 (1983).

* * *

The production demanded here does not infringe on British sovereignty as it calls merely for documents, not a personal appearance. Defendant cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad. Nor can it shield documents by destroying its own copies and relying on customary access to copies maintained by its affiliate abroad. If one defendant could so easily evade discovery, every United States company would have a foreign affiliate for storing sensitive documents.

(quoting *Cooper*, 102 F.R.D. 920).

Id. at 607. *Cooper*, it should be noted, dealt with the discovery of documents in the possession of the defendant's

British affiliate; by contrast, *Jones v. Societe* (and *Anschuetz*) deal with documents in the possession of a totally foreign corporation. The Fifth Circuit further backed up its position with language from a federal district court sitting in Illinois deciding similar discovery issues in a patent infringement case. The court in *Graco v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984), in permitting the discovery from a French corporation without requiring compliance with the Hague Convention, explained the reasons for the Hague Convention:

It cannot be denied that foreign displeasure played some part in shaping the convention, but it is a mistake, the court believes, to view the convention as an international agreement to protect foreign nationals from American discovery when they are parties properly before American courts. Two important purposes of an international convention of this type relate to discovery of non-parties, and would justify the convention's existence regardless of how the convention is deemed to apply with respect to parties before the court. First, a non-party witness may be willing to be deposed at home, but may be unwilling to travel to the country in which the litigation is proceeding. Since some countries would consider the taking of evidence within their borders a usurpation of judicial prerogative, an international agreement setting up a framework for seeking and granting permission has great value, allowing evidence to be taken without affront to local authorities. Second, an unwilling non-party witness simply cannot be reached, if outside the court's jurisdiction, unless authorities in the witness' state use their authority to compel the giving of evidence. An international agreement provides a framework for the invocation of a foreign authority's compulsory powers, making accessible evidence which otherwise would not have been accessible. A multi-state convention, rather than a series of two state agreements, confers the added benefit of standardized procedures.

Id. at 519-20 (quoted in *Anschuetz* at 611). Civil law states take the position that gathering evidence *within* the state is exclusively within the province of that state's courts; any encroachment on this function may be regarded as a violation of the state's "judicial sovereignty." *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 853, 176 Cal. Rptr. 874, 881 (1982).

The *Anschuetz* court found "particularly apt the [*Graco*] court's observation that the Convention does not require deference to a foreign country's judicial sovereignty over documents, people, and information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States. . . ." *Anschuetz*, 754 F.2d at 611. The Fifth Circuit determined that "matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention." *Id.* Another effect of requiring that interrogatories and document requests be directed through foreign authorities under the Convention, the court noted, was the drastic and costly change in handling litigation which would occur due to the procedures required under the Convention. *Id.* at 612.

The Fifth Circuit did note that judicial power over international discovery should be "tempered by a healthy respect for the principles of comity", *id.* at 614 but found

[T]he Hague Evidence Convention contains no express provision for exclusivity. In addition, extra-territorial discovery has been a standard practice of American courts for some time, and there is no evidence that the American negotiators, the Department of State, or the Congress intended to prohibit the prac-

tice. In fact, the Senate Report emphasized that the Convention was intended to improve, not thwart, the means of securing evidence abroad.

As noted by defendants, the *Anschuetz* court did not order discovery or issue mandamus, but did direct the lower court to consider fashioning its discovery orders in light of the principles discussed by the Fifth Circuit. *Id.* The Court of Appeals did state that the trial court could order documents to be produced and witnesses to be examined in the United States if the defendant was not "voluntarily forthcoming in Germany" and that the "full range of sanctions available in the federal rules" could be applied to parties over whom the court had in personam jurisdiction. *Id.*

Other courts which have addressed the issue have allowed discovery and discussed the arguments now being advanced by the defendant French corporations. Regarding defendant Lufthansa's argument that the Hague Convention is the exclusive means for compelling it to produce documents and secure the deposition of two of its officers:

Nowhere in these [discovery] Rules is there the slightest suggestion that a party properly before the Court may not avail itself of these discovery rights against another party within the jurisdiction of the Court merely because the documents sought or the persons to be deposed are not located in the United States. Indeed, the Rules clearly contemplate their applicability abroad if the United States Court has jurisdiction. *See, e.g.,* Rule 28(b), Fed. R. Civ. P.

Laker Airways, Ltd. v. Pan American World Airways, 103 F.R.D. 42, 48 (D.C.D.C. 1984). In determining that the

issue was not a matter of supremacy over state law, but rather which federal law—the Hague Convention or the Federal Rules of Civil Procedure—should be applied, the district court for the Southern District of New York reasoned:

A finding that the production of documents is precluded by foreign law does not conclude a discovery dispute. A United States court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary. *Society International v. Rogers*, 357 U.S. 197, 204-06 (1958); *United States v. First National City Bank*, 396 F.2d 897, 900-09 (2d Cir. 1968); *United States v. Vetco*, 644 F.2d 1324, 1329 (9th Cir., cert. denied, 454 U.S. 1098 (1981)). Plaintiffs have urged this Court to defer to the French [blocking] statute and to decline to order the requested discovery.

In fact, it is suggested that we are required to do so, because Article 11 and 21 of the Hague Convention on the Taking of Evidence Abroad would permit a party confronted with a statute such as Article 1 to refuse to give evidence. Because the United States is a signatory to the Convention, the argument continues, this Court is bound by its provision and must also permit plaintiffs to refuse to produce the documents. In essence, plaintiffs argue that the Articles of the Hague Convention withdraw from this court the right to employ the discovery devices provided in the Federal Rules of Civil Procedure because they conflict with the provisions of the French Law No. 80-538.

The Hague Convention, signed by both France and the United States, is an international treaty and as such is entitled to be recognized as part of the supreme law of the land. (citation omitted.) The Federal Rules of Civil

Procedure, duly enacted by Congress, are also part of the supreme law of the land. Absent a direct conflict, our duty is to enforce them both. Nothing in the legislative history of the Hague Convention nor in the Congressional proceedings at the time of its adoption, suggests that Congress intended to replace, restrict, modify or repeal the Federal Rules. Indeed, Philip Amram, a member of the United States delegation to the 1968 session of the Convention, described its provisions as a 'climax [of] more than a generation of effort . . . by those interested in modernizing and improving international judicial assistance' and stated it would effect 'no major changes in U.S. procedure [nor require any] changes in U.S. legislation or rules.' (citation omitted.)

Treaties should be construed so as to effect their purposes (citation omitted), and to be as consistent, insofar as possible, with coexisting statutes, (citation omitted). The goal of the Hague Convention was to facilitate and increase the exchange of information between nations. It would not serve this goal to transform its provisions into a means to frustrate the discovery process. We conclude, therefore, that this Court is not required to defer to the French statute by virtue of the Hague Convention.

Compagnie Francaise d'Assurance v. Phillips Petroleum Co., 81 Civ. 4463-CLB, slip op. at 10-12 (S.D.N.Y. Jan. 25, 1983) (quoted in *Anschuetz*, 754 F.2d at 613 n.28 and *Laker*, 103 F.R.D. at 49).¹

¹Other cases of note on this issue, but not addressing the Hague Convention argument specifically: *In re Uranium Anti-trust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) ("Once

(Continued on following page)

On the other side of the judicial coin are the opinions of a few courts which have required compliance with the Hague Convention. In *Volkswagenwerk A. G. v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1982), the plaintiff in the originating case sought inspection of defendant's German plant and production of documents and other discovery in Wolfsburg, West Germany. The California Court of Appeals decided on the basis of international comity and judicial restraint that plaintiffs had to comply with the Hague Convention in obtaining this discovery which was within the German courts' "judicial sovereignty." *Id.* at 853, 176 Cal. Rptr. at 881. Similarly, in

(Continued from previous page)

personal jurisdiction over the person and control over the documents by the person are present, a United States court has power to order production of the documents. The existence of a conflicting foreign law which prohibits the disclosure of the requested documents does not prevent the exercise of this power."); *La Chemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 604 (D. Del. 1971) ("There is no affidavit in the record indicating the bulk or cost of shipping the documents here and really no factual basis on which the Court may sustain [the objection to production of documents located in France]. It would appear offhand that shipping the documents to the United States would entail less expense than attorneys making the trip to France for such discovery."); see also *Murphy v. Reifenhauer KG Maschinenfabrik*, 101 F.R.D. 360, 363 ("[C]omity [in the legal sense . . . the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation] does not require plaintiff [administrator of estate of son who was killed by a machine made by defendant] to proceed first under the Convention in this case, particularly at this relatively late stage of discovery, and particularly where it appears that a request for production of documents under the Convention would be futile." . . . We need not attribute defendant's delay in raising this issue to bad faith in order to find that this case should not be further prolonged for many months in order to accommodate a somewhat hypothetical conflict between ordinary American discovery and German sovereignty.").

Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982), the court vacated an order in a products liability action which required the defendant West German corporation to answer written interrogatories without compliance with the Hague Convention. This determination was also based on the "supremacy" of the Hague Convention as federal over state law (California Rules of Civil Procedure) and "in exercise of judicial restraint based on international comity." *Id.* at 245, 186 Cal. Rptr. at 880. In denying a motion to compel answers to interrogatories and to produce documents, the District Court for the Eastern District of Pennsylvania required the plaintiff to comply with the Hague Convention. *Philadelphia Gear Corp. v. American Pfauter Corp. & BHS-Dr. Ing. Hofler GmbH*, 100 F.R.D. 58 (E.D. Pa. 1983). In coming to this decision, the court relied on the California cases, stating:

To allow the forum court to supplement the convention with its own practices would not promote uniformity in the gathering of evidence nor generate a spirit of cooperation among signatories to the treaty. . . . Obviously, to permit one sovereign to foist its legal procedures upon another whose internal rules are dissimilar would run afoul of the interests of sound international relations and comity.

Id. at 60. In a footnote, the court found no merit in plaintiff's argument that because defendant had served discovery requests pursuant to the Federal Rules of Civil Procedure, it should be estopped from asserting the applicability of the Hague Convention. "The Convention is at issue only when a litigant from a signatory country seeks evidence in another signatory country other than where the case is pending. Hofler's request did not seek

to take any evidence abroad. It was directed to a party residing in the country where the litigation was initiated." *Id.* at 61 n.5.

These cases were distinguished in *Graco v. Kremlin, Inc.*, 101 F.R.D. 503, 517-24 (N.D. Ill. 1984). The *Graco* court noted that in *Volkswagenwerk*, discovery orders involving formal discovery proceedings to be conducted in West Germany were involved, which would call for application of the Hague Convention. *Pierburg*, which involved only written interrogatories to a West German defendant, was, in the opinion of the *Graco* court, not well reasoned and distinguishable from *Volkswagenwerk*, upon which the *Pierburg* court relied. *Graco*, 101 F.R.D. at 518-19. *Philadelphia Gear*, the *Graco* court noted,

cites the Convention's purpose of promoting mutual judicial cooperation, apparently associating this notion also with principles of comity. . . . International judicial cooperation is, however, or at least should be, an extraordinary measure, employed to protect the sovereign interests of another country when those interests truly are implicated. Trying (or pre-trying) a case in two different countries' courts is not a desirable way of handling routine litigation. Involving two judicial systems in a single lawsuit is as likely to disrupt international relations as it is to promote them, especially when the two systems are brought together for discovery purposes.

Id. at 523. Examining Article 23 of the Convention, which permits a state to refuse to execute a letter rogatory issued to obtain pretrial discovery of documents, the *Graco* court concluded that such a broad interpretation as the *Philadelphia Gear* court gave would give foreign courts power over the conduct of litigation in American courts:

Either American courts would surrender jurisdiction by treating the decisions of foreign authorities as

final and unreviewable, or they would invite endless motions and real international friction by second-guessing those decisions. The court cannot understand why a requirement making such judicial cooperation routine should be inferred from a treaty containing very little language to justify its inference, and the court also does not believe that principles of international comity demand (or are served by) such a requirement.

Id. at 524. The court did not require Graco to proceed only under the Convention, emphasizing that it was not ordering that any proceeding be conducted within France.

Defendants argue that they are caught in a legal "Catch-22" in that, by French statute, they are subject to penalty if they provide commercial information to foreign public entities without complying with the Hague Convention. French Penal Code, Law No. 80-538, Articles 1 and 1-bis. At the same time defendants are subject to sanctions by American courts if they fail to cooperate in discovery.

The French law in question was originally "inspired to impede enforcement of United States antitrust laws," but was phrased without a requirement that antitrust law be involved. *See Toms, The French Response to Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, 586, (1981). The provision of the law in question here is Article 1-bis which provides:

Subject to any treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to

foreign administrative or judicial proceedings or as a part of such proceedings.

Toms, *supra* at 611. Violation of this section is punishable by a prison term of two to six months and/or a fine of 10,000 to 120,000 Francs. French Penal Code, Law No. 80-538, Article 3. Article 1-bis' application is limited to discovery within French territory, Toms, *supra* at 595, and a party who is affected by the law may seek a waiver of its provisions from the appropriate French minister, to whom they are to report such requests. French Penal Code, Law No. 80-538, Article 2; *see Soletanche and Rodio v. Brown and Lambrecht*, 99 F.R.D. 269, 271 (N.D. Ill. 1983) (holding compliance with court's discovery order would not impose "too great a burden" on plaintiffs as they were only being required to contact the appropriate minister, as required by law, and request a waiver). It appears that Articles 1 and 1-bis have not been strictly enforced in France, *see Toms, supra* at 599 and 605. The Toms article also notes that "the legislative history [of the Law] shows only that the Law was adopted to protect French interests from abusive foreign discovery procedures and excessive assertions of extraterritorial jurisdiction. Nowhere is there an indication that the Law was to impede litigation preparations by French companies, either for their own defense or to institute lawsuits abroad to protect their interests, and arguably such applications were unintended." Toms, *supra* at 598.

The "Catch-22" situation which defendants face has been addressed by the federal district court sitting in the Northern District of Illinois on at least two occasions. In *Soletanche and Rodio v. Brown and Lambrecht*, the court ordered plaintiff French corporations to answer inter-

rogatories and produce documents in spite of Law No. 80-538 and potential criminal liability. 99 F.R.D. 269 (N.D. Ill. 1983).

As the Seventh Circuit recently stated, "the fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production." (Citations omitted). In doing so, however, the court is required to engage in a sensitive balancing of the competing interests at stake in compelling such production. . . .

. . . [T]he factors to consider in balancing competing interests . . . are: vital national interests of each of the states; the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; the extent to which the required conduct is to take place in the territory of the other state; the nationality of the person; and the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Id. at 271. See also *Graco v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984) for a discussion of the problems created by Article 1-*bis*.

The vital national interest in this case is protection of United States citizens from harmful foreign products and compensation for injuries caused by such products. France's interest is protection of their citizens from intrusive foreign discovery procedures; however, it does not appear that France has strictly enforced the law. Defendants face no extraordinary hardship at this point as it is not clear that the law will be strictly enforced against them. The required conduct does not have to take place in France as the interrogatories can be answered in the United

States and the documents requested produced there. The defendants are French national corporations. The final factor does not come into consideration here as the Court is not at this stage concerned with enforcement of discovery orders.

III. CONCLUSION

Based on the foregoing discussion, this Court denies the defendants' motion for protective order insofar as it relates to answering interrogatories, producing documents and making admissions. This decision is based on the Court's concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts and the potential interference with such proceedings which forcing compliance with foreign court procedures would cause.

If interpreted as preempting routine interrogatories and document requests, the Convention really would be much more than an agreement on taking evidence abroad, which is what it purports to be. Instead, the Convention would amount to a major regulation of the overall conduct of litigation between nationals of different signatory states, raising a significant possibility of very serious interference with the jurisdiction of the court in which the litigation is begun. The solicitude for the judicial sovereignty of civil law countries shown in *Schroeder*, *Philadelphia Gear*, and *Pierburg* apparently is unmatched by any recognition that they are suggesting a startling limitation on the sovereign powers of this country, as expressed through its courts. Treating the Convention procedures as exclusive would make foreign authorities the final arbiters of what evidence may be taken from their nationals, even when those nationals are parties properly within the jurisdiction of an American court.

Graco, 101 F.R.D. at 521-22. This Court is not dealing with a conflict between state rules of civil procedure and a treaty, but with a conflict between two essentially equal federal laws. To permit the Hague Evidence Convention to override the Federal Rules of Civil Procedure would frustrate the courts' interests, which particularly arise in products liability cases, in protecting United States citizens from harmful products and in compensating them for injuries arising from use of such products. As to defendants' argument of illegality, this Court determines that the United States' interests are stronger than potential French interests, given no strong evidence that Law No. 80-538 is strictly enforced. The conduct to be ordered does not have to take place in France and the procedures to be ordered are not greatly intrusive or abusive.

For these reasons, the Court orders discovery as follows:

1. Defendant shall answer the interrogatories propounded by plaintiffs and respond to plaintiffs' request for admissions and for production of documents on or before October 1, 1985.

2. If discovery depositions are to be undertaken, the Court will require compliance with the Hague Evidence Convention if such depositions are to be conducted in France, based on the Court's understanding of the current law.

IT IS SO ORDERED.

Dated this 31st day of July, 1985.

/s/ R. E. LONGSTAFF
R. E. Longstaff
U.S. Magistrate

APPENDIX C

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention.

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose.

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

CHAPTER 1—LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority or another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify—

- (a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- (d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, *inter alia*—

- (e) the names and addresses of the persons to be examined;

- (f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

- (g) the documents or other property, real or personal, to be inspected;

- (h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

- (i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justi-

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liable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their rep-

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resentatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that—

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II—TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if—

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

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(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permissions.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

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Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence—

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

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(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III—GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine

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the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to ~~compel~~ the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from—

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

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(b) permitting by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from—

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Pro-

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cedure signed at the Hague on the 17th of July 1905¹ and the 1st of March 1954,² this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

¹99 *British Foreign and State Papers* 990.

²286 UNTS 265.

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Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following—

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

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(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations

or of a specialized agency of the Organization, or a Party to the Statute of the International Court of Justice¹ may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

¹TS 993; 59 Stat. 1055.

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At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.¹

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following—

¹Extended to Guam, Puerto Rico, and the Virgin Islands pursuant to notification sent by the American Embassy at The Hague on Feb. 6, 1913.

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(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 40 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

In Witness Whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channels, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

APPENDIX D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 33. Interrogatories to Parties

(a) **Availability; Procedures for Use.** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers and objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) **Scope; Use at Trial.** Interrogatories may relate to any matters which can be inquired into under Rule 26(b),

and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

RULE 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a short-

er or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

RULE 36. Requests for Admission

(1) **Requests for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available

for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject

to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

APPENDIX E

Translated from the French

July 17, 1980 OFFICIAL JOURNAL OF THE FRENCH
REPUBLIC 1979

LAWS

ACT 80-538 of July 16, 1980 relative to disclosure of economic, commercial or technical documents and data to natural persons or legal entities.

The National Assembly and the Senate have adopted,

The President of the Republic promulgates the following Act:

Art. 1. The title of Act 68-678 of July 26, 1968 relative to disclosure of documents and information to foreign authorities in the field of maritime commerce is amended to read:

“Act relative to disclosure of economic, commercial, industrial, financial or technical documents and data to natural persons or legal entities”.

Art. 2. I—Article 1 of Act 68-678 of July 26, 1968 aforesaid is worded as follows:

“Art. 1. Subject to treaties or international agreements, it is prohibited for any natural person of French nationality or habitually residing in French territory and for any executive, representative, employee or agent of a legal entity having its registered office or an establishment therein to disclose in writing, orally or otherwise, in any place, to foreign public authorities, economic, commercial, industrial, financial or technical documents or

data disclosure of which is liable to infringe the sovereignty, security, essential economic interests of France or public policy, specified by the administrative authorities if need be”.

II—Article 1A reading as follows is inserted after article 1 of Act 68-678 of July 26, 1968 aforesaid:

“Art. 1A. Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith”.

Art. 3. Article 2 of Act 68-678 of July 26, 1968 aforesaid is amended to read:

“Art. 2. The parties mentioned in articles 1 and 1A shall forthwith inform the competent minister if they receive any request concerning such disclosures”.

Art. 4. Article 3 of Act 68-678 of July 26, 1968 aforesaid is amended to read:

“Art. 3. Without prejudice to heavier penalties prescribed by law, any breach of articles 1 and 1A of this Act shall be punished by imprisonment for two to six months and a fine of 10,000 to 120,000 F or either”.

This Act shall be executed as a State law.

Paris, July 26, 1980.

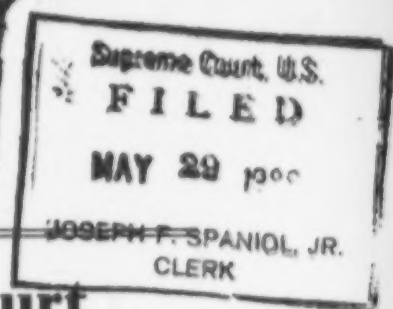
Signed by Valery Giscard D'Estaing, President of the Republic, Raymond Barre, Prime Minister, Alain Peyrefitte, Minister of Justice, Jean Francois Poncet, Foreign Min-

App. 48

ister, Rene Monory, Minister of the Economy, Andre Giraud, Minister of Industry, Joel Le Theule, Minister of Transportation, Jean-Francois Deniau, Minister of Foreign Trade and Maurice Charretier, Minister of Commerce and Crafts.

[Seal]

(3)
No. 85-1695



In the Supreme Court OF THE United States

OCTOBER TERM, 1985

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties in Interest)

REPLY BRIEF IN SUPPORT OF PETITION

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May 28, 1986

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No. 85-1695

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties in Interest)

REPLY BRIEF IN SUPPORT OF PETITION

The Court has acknowledged the importance of the questions presented here by its grant of certiorari in *Messerschmitt Bolkow Blohm, GmbH v. Walker*, 54 U.S.L.W. 3686-87 (U.S. April 22, 1986) (No. 85-99). Respondents concede that *Messerschmitt* raises similar issues to this case but assert, without explanation, that these issues are somehow distinguishable. Both this case and *Messerschmitt* present the question of whether U.S. courts are free to disregard the procedures of the Hague Evidence Convention where discovery of evidence located abroad is sought from a foreign national over whom the court has personal jurisdiction. The only factors which distinguish this case from *Messerschmitt* are additional reasons why certiorari should be granted or, alter-

natively, why the Court should defer action on this case until after *Messerschmitt* is decided. Respondents' arguments to the contrary show a fundamental misunderstanding of the Hague Evidence Convention and the principle of international comity.¹

I

THE ONLY FACTORS WHICH DISTINGUISH THIS CASE FROM *MESSERSCHMITT* ARE ADDITIONAL REASONS WHY CERTIORARI SHOULD BE GRANTED

The decision below holds that the Hague Evidence Convention does not apply to the discovery sought in this case. It supports that conclusion by quoting from and citing to the Fifth Circuit's decisions in *Messerschmitt* and *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98). See Pet. App. A at 4a-5a. At a minimum, the Court's decision to review *Messerschmitt* requires reconsideration of the decision below, which follows and applies *Messerschmitt*. There are, however, certain factors which distinguish this case from *Messerschmitt* and which the Court should consider as additional reasons to hear this case in conjunction with, or in addition to *Messerschmitt*.

¹ Respondents also misread Supreme Court Rule 18. They argue that, because the petition concerns review of a district court's interlocutory order, it should be heard only if it presents a question "of such imperative public importance as to justify the deviation from normal appellate practice." Brief in Opposition at 7. Rule 18 applies only to the question of whether the Court should grant certiorari to review a case *before* a court of appeals has entered any order or judgment. 12 J. MOORE, H. BENDIX, B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 434.01 (2d ed. 1982). See, e.g., *U.S. v. Nixon*, 418 U.S. 683 (1974); *New Haven Inclusion Cases*, 399 U.S. 392 (1969). Here the court of appeals has reached a final decision on the merits of the matter before it. Moreover, under 28 U.S.C. § 1254, the Court has power to review by certiorari federal appellate decisions which rule on interlocutory orders, and it has often done so where, as here, the standards of Rule 17 have been satisfied. See, e.g., *Messerschmitt*; *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916).

The first such factor is that disclosure of the documents and information sought by respondents will violate French Penal Code Law No. 80-538 (the "French Blocking Statute"). There is no blocking statute at issue in *Messerschmitt*. Such statutes have a special significance in performing the comity analysis which the Solicitor General has commended to the Court. The Solicitor General has told the Court, first, that "courts should refrain, when feasible, from ordering a party to perform acts that would violate the laws or clearly articulated policies of a foreign government."² Second, the Solicitor General has said that the existence of a blocking statute might be considered "as a measure of the foreign nation's depth of resolve concerning its 'judicial sovereignty.'"³

A second important factor which distinguishes this case from *Messerschmitt* is that the decision below makes no pretext of engaging in a comity analysis as to whether the procedures of the Hague Evidence Convention should be followed. The decision below states categorically that the Convention *does not apply* to discovery of evidence and information located abroad from a foreign national over whom the court has personal jurisdiction so long as the physical production of the documents and information occurs in the United States. Pet. App. at 5a. Thus, even were the Court to adopt the Solicitor General's view that the *Messerschmitt* court engaged in an adequate comity analysis and reached an "essentially correct" result,⁴ the decision below would not be vindicated.

Finally, unlike *Messerschmitt*, this case has not yet gone to trial. Although counsel for *Messerschmitt* has informed the Court that the Hague Evidence Convention question there presented has not become moot because appeals are being taken, there remains some risk that mootness will occur before the Court decides *Messerschmitt*. Such risk is remote here.

² Brief for United States as Amicus Curiae at 11, *Anschuetz and Messerschmitt*.

³ *Id.* at 15.

⁴ *Id.* at 6.

II

RESPONDENTS MISSTATE THE QUESTION PRESENTED AS ONE OF JUDICIAL POWER RATHER THAN AS ONE OF INTERNATIONAL COMITY

Respondents and the decision below appear to believe that the Convention can be circumvented whenever a court has personal jurisdiction over a foreign national by ordering that the physical production of the documents and information located abroad take place on American soil. This position creates a distinction not found in the treaty and confuses in personam jurisdiction with the exercise of the power to compel.

Respondents assert repeatedly that the Hague Evidence Convention does not apply at all to the discovery requests here in issue. While the decision below indeed so held, this is contrary to the weight of authority, including many of the decisions on which respondents and the court below rely.⁵

The Hague Evidence Convention exists to protect the judicial sovereignty of its signators and to foster mutual judicial cooperation in civil or commercial matters.⁶ By its terms, the Convention applies equally to the discovery of evidence abroad from litigants and non-litigants. Nowhere in the language of the Convention is a distinction drawn between parties and non-parties. In its statements to the Court, the Solicitor General has explicitly rejected such a distinction:

⁵ See, e.g., *Work v. Bier*, 106 F.R.D. 45, 56 (D.D.C. 1985); *Slauenwhite v. Bekum Maschinfabriken GmbH*, 104 F.R.D. 616, 618-19 (D. Mass. 1985); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 520-24 (N.D. Ill. 1984); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 443-44 (S.D.N.Y. 1984); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227, 1229 (E.D. Pa. 1983).

⁶ "The foundation of the Convention is to avoid international friction where a domestic state court orders civil discovery to be conducted within the territory of a civil law nation that views such unilateral conduct as an intrusion upon its judicial sovereignty." *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 244, 186 Cal. Rptr. 876 (1982).

The fact that a state court has personal jurisdiction over a private party . . . does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. *The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of the parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction.* [Brief for United States as Amicus Curiae at 7 n.3, *Volkswagenwerk A.G. v. Falzon*, 465 U.S. 1014 (1984) (appeal dismissed) (emphasis supplied).]

Respondents consistently misstate the question presented here as one of judicial power.⁷ No one denies the jurisdiction of the district court to order petitioners, as parties to the action before it, to give discovery of evidence in France. Rather, the issue is whether, "in the exercise of judicial restraint based on international comity,"⁸ the court should require respondents to use the Convention's procedures. As one commentator has explained:

The fact that the witness, documents, or person in control of documents or other evidence located abroad is subject to the jurisdiction of the court does not necessarily mean that the American court should apply the ordinary discovery practices of the forum.

* * *

The existence of jurisdiction is relative rather than absolute. The notion that jurisdiction to command appearance before the court "domesticates" the witness or party for all purposes relevant to the litigation is fallacious. The court should not ignore the foreign nationality or locus of the

⁷ Respondents state the question as:

[M]ay a district court order a foreign defendant over whom it has personal jurisdiction to respond to interrogatories and requests for production in the United States, even if the defendant must resort to sources of information located abroad? [Brief in Opposition at 10.]

⁸ *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 859, 176 Cal. Rptr. 874 (1981).

witness or evidence. [Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 739-41 (1983).]

Ordering documents to be produced on American soil does not make the issue disappear. Civil law countries regard the taking of evidence as a judicial function rather than as an act of the parties; when evidence is taken without the participation of the country where the evidence is located, its judicial sovereignty is considered violated. See Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp. L.Q. 646, 647 (1969). While the degree of intrusion on foreign judicial sovereignty would be an appropriate factor to consider in a comity analysis,⁹ respondents and the decision below improperly employ a geographic fiction as a ground for dispensing with a comity analysis entirely.

III

RESPONDENTS' CONJECTURE THAT USE OF THE CONVENTION WOULD PROVE FUTILE IS NOT A BASIS FOR DISPENSING WITH A COMITY ANALYSIS

Respondents, like the decision below, do not squarely address the question of whether international comity requires adherence to the procedures of the Hague Evidence Convention here, at least in the first instance. Instead, respondents attempt to stand the question on its head by challenging petitioners to prove that use of the Convention's procedures will be effective.

Respondents have made no attempt to employ the Convention's procedures. As several courts have noted, until a party makes proper application for the evidence located abroad through a letter of request, we cannot know what discovery it can obtain.¹⁰

⁹ See generally RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

¹⁰ See, e.g., *Gebr. Eickhoff Maschinfabrik und Eisengieberei v. Starcher*, 328 S.E. 2d 492, 502 (W. Va. 1985); *Vincent v. Ateliers de la*

Nonetheless, respondents' arguments that use of the Convention's procedures would be futile are not well founded.

Respondents point first to France's declaration under article 23 of the Convention, reserving its right not to execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." The Court should not assume that countries which have exercised their right under article 23 will fail to cooperate in providing requested evidence contained in documents. To the contrary, it appears that this reservation was only intended to prevent discovery of a "fishing nature."¹¹ According to the Special Commission on the Convention's operation, "[r]efusal to execute turns out to be very infrequent in practice."¹² Moreover, the Convention narrowly circumscribes those situations in which the execution of a letter of request may be refused. Art. 12, Pet. App. at 30a. It also expressly contemplates good faith attempts by foreign courts to implement any legitimate discovery request. Art. 9, Pet. App. at 29a.¹³ In matters similar to the present one, the French Ministry of Foreign Affairs has advised foreign litigants to seek information of a technical or commercial nature through the Convention's procedures.¹⁴

Motobecane, S.A., 193 N.J. Super. 716, 475 A.2d 686, 690 (1984); *Lasky v. Continental Products Corp.*, 569 F. Supp. at 1229.

¹¹ Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 Int'l Legal Materials 1417, 1421 (1978).

¹² Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 Int'l Legal Materials 1425, 1431 (1978).

¹³ See *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 61 (E.D. Pa. 1983); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal.App.3d at 858.

¹⁴ See *Vincent v. Ateliers de la Motobecane, S.A.*, 475 A.2d at 689-90.

Respondents also mention that France has declined to make a declaration under article 18 that it will use compulsion to assist diplomatic officers to take evidence in France. Article 18, however, is concerned with compulsion for the taking of oral testimony before an official of the requesting State and has no relevance to the written discovery requests here in issue.

Nor does France's enactment of a blocking statute indicate, as respondents claim, an "official policy" to bar discovery from French litigants in United States courts. See Brief in Opposition at 14. On the contrary, because the French Blocking Statute contemplates criminal penalties only for the disclosure of information not made through the procedures of the Hague Evidence Convention, it expresses a strong French governmental policy in favor of the Convention's use. This clearly articulated policy is an important comity consideration *favoring* adherence to the Convention's procedures.

The heart of respondents' objection to use of Hague Evidence Convention procedures is that France "will use its own unreviewable discretion to decide what, when, and where litigants will be able to obtain information necessary to prepare their case." Brief in Opposition at 14. While it cannot be expected that the French government would exercise no control over discovery on its soil, use of the Convention does not require the American court to surrender its jurisdiction over the foreign national. A party dissatisfied with the fruits of discovery conducted through the Convention can return to the trial court for further assistance. The court would then be in a position to weigh the interest of comity against the needs of the particular litigant on the basis of a record instead of on the basis of conjecture.¹⁵

¹⁵ Respondents and the decision below suggest that allowing the trial court to order further discovery if requests made through the Convention's procedures are not honored would be "the greatest insult to the civil law nation's sovereignty". Pet. App. at 7a; Brief in Opposition at 15. This argument misunderstands the nature of comity. International comity is concerned with avoiding conflicts with the sovereign interests of foreign nations where possible, not with "mere courtesy and good will." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

Finally, respondents claim that the petition asks the Court to issue an "advisory opinion" on the French Blocking Statute.¹⁶ This is false. The questions presented concern the applicability and use of the Hague Evidence Convention. They have been ruled upon by two lower courts here as well as by numerous other courts. Respondents' specious "ripeness" argument treats the question of deference to the French Blocking Statute in isolation from the question of whether the Convention's procedures should be followed, and not as a factor in a comity analysis. It is only in this latter context that any issue concerning the French Blocking Statute has been presented to the Court.

CONCLUSION

The decision below, like *Messerschmitt*, is representative of a line of cases construing the Hague Evidence Convention which, if permitted to stand, will relegate the Convention to disuse. Certiorari should be granted to address important questions of international comity which the decision below ignores.

Respectfully submitted,

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¹⁶ Brief in Opposition at 15.

AUG 22 1986

JOSEPH F. SPANIOL, JR.
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No. 85-1695

In the Supreme Court**OF THE
United States**

OCTOBER TERM, 1985

**SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISME,
*Petitioners,***

VS.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
*Respondent.*****(DENNIS JONES, JOHN and ROSA GEORGE,
Real Parties in Interest)****On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit****JOINT APPENDIX****JOHN W. FORD*
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In the United States District Court
For the Southern District of Iowa
Central Division

Civil No. 82-453-C

Dennis F. Jones,
Plaintiff,

vs.

Societe Nationale Industrielle Aerospatiale,
a French corporation; et al.
Defendants.

Civil No. 82-615-A

John George and Rosa George,
Plaintiffs,

vs.

Seed & Grain Construction Co., an Iowa corporation; et al.,
Defendants.

Motion for Protective Order

COME NOW the Defendants, Societe Nationale Industrielle Aerospatiale and Societe De Construction d'Avions De Tourisme, and pursuant to Federal Rule of Civil Procedure 26(c), request that the Court enter an Order that discovery may be had from these Defendants only upon certain specified terms and conditions, for the following reasons:

1. Plaintiffs John George and Rose (sic) George and Dennis Jones, have filed requests for admissions, interrogatories and requests for production of documents directed to these Defendants.

2. These Defendants are French corporations and therefore, Defendants request that the Court order the Plaintiffs to comply with the Hague Convention in seeking discovery from these Defendants.

3. Both France and the United States are signatories to the Hague Convention and since its enactment in 1970, the Hague

Convention has dictated the procedure in which a party may seek discovery from a foreign national in a foreign nation. Plaintiffs here seek discovery from Defendants, French corporations, and the discovery sought can only be found in a foreign state, namely, France.

4. Under French penal law, Defendants may only respond to discovery requests which comply with the Hague Convention. French Penal Code Law No. 80.538 Article 1a, enacted July 16, 1980.

5. For the foregoing reasons, Defendants request that the Court enter an order requiring that Plaintiffs comply with the Hague Convention in seeking discovery from these Defendants.

WHEREFORE, Defendants Societe Nationale Industrielle Aerospatiale and Societe De Construction d'Avions De Tourisme, pray that the Court enter a protective order in the particulars set forth above.

/s/ MARSHA TERNUS

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(515) 243-4191

Attorneys for Defendants

Societe Nationale

Industrielle Aerospatiale

and Societe De Construction

d'Avions De Tourisme

In The United States District Court
For the Southern District of Iowa
Central Division

Civil No. 82-453-C

Consolidated

Dennis F. Jones,

Plaintiff,

vs.

Societe Nationale Industrielle Aerospatiale,
a French corporation; et al.

Defendants.

Civil No. 82-615-A

John George and Rosa George,

Plaintiffs,

vs.

Seed & Grain Construction Co.,
an Iowa corporation; et al.,

Defendants.

Defendants' Brief In Support Of Motion
For Protective Order

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BRIEF POINT I

THE HAGUE CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, BEING A TREATY RATIFIED BY THE CONGRESS OF THE UNITED STATES AND TO WHICH FRANCE IS A PARTY, IS THE SUPREME LAW OF THE UNITED STATES AND BARS THE DISCOVERY TECHNIQUES EMPLOYED BY THE PLAINTIFFS.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *done* March 18, 1970, 23 U.S.T., 2557, T.I.A.S. No. 7444 (hereinafter referred to as the "Hague Convention"), was entered into force for the United States on October 7, 1972. France is one of the signatory countries to the Convention. (The text of the 1970 Hague Convention and a list of its signatory parties are attached as Exhibit A). The Hague Convention provides for three methods of obtaining evidence from individuals or corporations abroad: (1) designation of a private commissioner, (2) notice to appear before an American consulate officer or a foreign officer, or (3) letters rogatory. *Pain v. United Technologies Corp.*, 637 F.2d 775, 778 n.67 (1980), *cert. denied*, 454 U.S. 1128 (1981). The purpose of the Hague Convention is "to facilitate the transmission and execution of letters of request" and "to improve mutual judicial cooperation in civil or commercial matters." See Hague Convention, initial unnumbered paragraphs 2, 3.

As a treaty, the Convention takes precedence over other law. Article VI, paragraph 2 of the United States Constitution provides in pertinent part as follows:

[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Because the Hague Convention is a treaty to which both the United States and France are signatories, the Convention is applicable to the present case, it is the supreme law of the United States, and federal courts are bound to abide by its terms under

article VI, paragraph 2 of the United States Constitution. The Hague Convention governs discovery by United States citizen plaintiffs from foreign individuals or corporations. See *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442, 443 (D. Del. 1982) (stating, in a case involving a French defendant, that the Hague Convention governs the discovery of any documents located in France). Since Plaintiffs' discovery requests do not comport with the requirements of the Hague Convention, they are improper and the Court should enter a protective order specifying that this and all further discovery during the pendency of this litigation be sought in accordance with the methods provided by the Hague Convention.

BRIEF POINT II

EVEN IF THE COURT DOES NOT READ THE HAGUE CONVENTION AS PREEMPTING THE DISCOVERY METHODS PROVIDED BY THE FEDERAL RULES OF CIVIL PROCEDURE, PRINCIPALS OF INTERNATIONAL COMITY, COURT EFFICIENCY, AND JUSTICE REQUIRE THAT PLAINTIFFS BE ORDERED TO PURSUE DISCOVERY IN ACCORDANCE WITH THE PROCEDURES SPECIFIED IN THE HAGUE CONVENTION.

The majority of courts which have had occasion to consider the issue have decided that even if the Hague Convention cannot be read to preempt rules of civil procedure relating to discovery in actions involving alien corporations, the discovery procedures provided by the Convention should be followed, at least until it becomes apparent that a foreign government will refuse the requested discovery. See *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. 17,222 (N.D. Ill. 1983); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Pierburg GMBH & Co. v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (Ct. App. 1982); *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (Ct. App. 1982); *Gebr. Eickhoff M.U.E. v. Starcher*, 328 S.E.2d 492 (W. Va. Ct. App. 1985); see also *Pain v. United Technology Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*.

454 U.S. 1128 (1981) (holding the same in the context of discovery requests to nonparties).

The *Pierburg* case is particularly instructive on this point, in that it reviewed prior case law, concluding that the "consistent approach of federal courts is to view the Hague Evidence Convention as compelled by comity". *Pierburg GMBH & Co. v. Superior Ct.*, 137 Cal. App. 3d 238, 243, 186 Cal. Rptr. 876 (Ct. App. 1982). The concept of international comity is that:

Courts of one sovereign state should not, as a matter of sound international relations, require acts or forbearances within the territory, and inconsistent with the internal laws of another sovereign state unless a careful weighing of competing interest and alternative means makes clear that the order is justified.

Murphy v. Reifenhauer KG Maschinenfabrik, 101 F.R.D. 360 (D. Ver. 1984). The rationale underlying the requirement that the Hague Convention be followed was best expressed by the United States District Court for the Eastern District of Pennsylvania in *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983). In that case the plaintiff filed a motion to compel one of the defendants, a German corporation, to answer interrogatories and produce documents requested by the plaintiff. The court denied the motion on the basis that the discovery requests did not comport with the procedures provided by the Hague Convention. The court ordered the plaintiffs to seek discovery under the Convention, stating:

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is a multilateral treaty that was designed to provide a uniform procedure to be used in obtaining evidence in foreign countries. A central purpose of the convention was to reconcile the markedly different discovery procedures that exist in common law countries, such as the United States, and civil law countries, such as West Germany. For example, unlike the practice in this country where depositions are conducted by attorneys outside the presence of the court, in civil law countries depositions are a function of the judiciary. The interrogation of witnesses is by

the judge and although counsel may suggest questions, no direct questioning or cross examination is permitted. At the close of testimony, the judge dictates a non-verbatim summary which is the official record of the proceeding. See Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 513, 527-29 (1953). Note, *Obtaining Testimony Outside the United States*, 29 Hastings L.J. 1237, 1247 (1978). Because the gathering of evidence is a function of a civil law country's courts, the usurpation of this function by the courts and citizens of a foreign nation may be considered a violation of the state's judicial sovereignty." See *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 852, 176 Cal. Rptr. 874, 881 (1981).

In order to avoid such intrusions and to provide an orderly system for foreign discovery, the United States and West Germany became signatories to the Hague Evidence Convention. Under the convention, three methods of obtaining evidence abroad may be used: notice to appear before a consular officer (Arts. 15, 16); the designation of a private commissioner (Art. 17); or a letter of request (Arts. 1-14) . . . In the present case, plaintiff has made no effort to comply with the Hague Evidence Convention. Instead, it argues that this treaty does not represent the exclusive means of gathering evidence abroad but rather was intended merely to supplement the less restrictive means provided by the Federal Rules of Civil Procedure. In support of this assertion, plaintiff points to Article 27 of the convention which states in part that "the provisions of the present Convention shall not prevent a Contracting State from— . . . permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention."

I disagree with plaintiff's contention. While the language of Article 27 is not conclusive, when this section is viewed in light of the underlying policies it permits only the country in which the evidence is being sought to supplement unilaterally the convention procedures with its internal rules. To allow the forum court to supplement the convention with its

own practices would not promote uniformity in the gathering of evidence nor generate a spirit of cooperation among signatories to the treaty. Instead, each state would be free to replace the convention procedures with its own practices at will. Obviously, to permit one sovereign to foist its legal procedures upon another whose internal rules are dissimilar would run afoul of the interests of sound international relations and comity. See *Pierburg GMBH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 244, 186 Cal. Rptr. 876, 881 (1982); *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 857, 176 Cal. Rptr. 874, 884 (1981).

More recently, the United States Supreme Court has hinted at the correctness of the conclusions reached by the courts in cases such as *Philadelphia Gear*. In a ruling issued April 19, 1983 in *Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303 (1983), the United States Supreme Court stayed the taking of foreign depositions in a case against a German corporate defendant even though the discovery had been ordered by the lower courts and the Supreme Court in Michigan. The defendant therein, as do the French Defendants herein, argued that plaintiffs' intended deposition method violated the Hague Convention. The Supreme Court twice ordered the stay. In its second opinion and order the Court indicated that there was a significant likelihood of success on the merits of the defendant's Hague Convention argument.

Plaintiffs place great reliance in their brief on the recent Fifth Circuit case of *In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985). Yet in *Anschuetz* the circuit court recognized that principles of comity are important in fashioning discovery procedure:

Of course, to say what is proper and permitted as an exercise of power by an American court acting under the federal rules is not necessarily to say that such a power should always be employed. Particularly in the realm of international discovery we believe the exercise of judicial power should be tempered by a healthy respect for the principles of comity.

In re Anschuetz & Co., 754 F.2d 602, 614 (5th Cir. 1985). It is also significant to note that the circuit court did not order discovery pursuant to the federal rules but rather instructed the district court to reconsider its prior orders permitting discovery without compliance with the Hague Convention in light of the principles stated in the circuit court's opinion. Furthermore, counsel for Defendants has been informed by Robert Dietz, attorney for the German defendant in *Anschuetz*, that the defendant has applied for a writ of certiorari from the United States Supreme Court.

Just as in the *Philadelphia Gear* case and in the other cases cited in this brief, principles of international comity and judicial restraint require the Court to order the Plaintiffs herein to pursue discovery in accordance with the procedures of the Hague Convention. The comity issue is particularly relevant to the instant case: the relative burden on Plaintiffs to comply with the Hague Convention pales in light of the burden placed on SNIAS should Plaintiffs' discovery requests be granted. Plaintiffs would simply have to comply with the Convention; as further discussed below, SNIAS would be placed in a position of possibly violating its own domestic law. Consequently, because Plaintiffs' discovery requests do not comply with the Hague Convention, they should not be permitted.

BRIEF POINT III

UNDER FRENCH PENAL LAWS, SNIAS MAY ONLY RESPOND TO DISCOVERY REQUESTS WHICH COMPLY WITH THE HAGUE CONVENTION

French Penal Code Law No. 80-538, enacted July 16, 1980, prohibits any French national or resident from distributing any commercial information to any foreign public entity and prohibits any foreigner from requesting such information, unless such information is sought pursuant to "treaties or international agreements and applicable laws and regulations". French Penal Code

Law No. 80-538 Article 1 *bis*.¹ Law No. 80-538 was specifically intended to require that all discovery in foreign proceedings follow the Hague Convention procedures: "Article 1 *bis* was intended to oblige parties to foreign litigation to comply with the Hague Convention and applicable French laws." Toms, *The French Response to the Extra Territorial Application of United States Anti-Trust Laws*, 15 Int'l Law 585, 598 (1981).

Placing SNIAS in the uncomfortable position of breaking French law in order to comply with a rule of civil procedure in this country is unreasonable, particularly because SNIAS is authorized to respond to discovery pursuant to the terms of the Hague Convention. Defendant SNIAS should not be placed in the untenable position of having to choose between violating French penal law and violating an order of this Court. *Cf. Laker Airways Ltd. v. Pan American World Airways*, 607 F. Supp. 324 (S.D.N.Y. 1985). All Plaintiffs need do is follow the procedures of the Hague Convention, which were established precisely to resolve situations such as this, and the legitimate interests of all parties will be protected.

¹ A true and correct copy of the French Law No. 80-538 is attached hereto as Exhibit B. The complete text Article 1 *bis* is as follows:

Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose in writing, orally, or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings, or in connection therewith.

CONCLUSION

The Hague Convention, an international treaty in force between the United States and France, establishes the procedures for obtaining discovery abroad from a foreign party. It also provides the only means by which SNIAS can comply with Plaintiffs' discovery requests without violating French domestic law. Principles of fairness and comity, if not the supremacy clause of the United States Constitution, require that Plaintiffs utilize the procedures of the Convention in requesting discovery from SNIAS.

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In The United States District Court
For the Southern District of Iowa
Central Division

Civil No. 82-453-C

Dennis F. Jones,
Plaintiff,

vs.

Societe Nationale Industrielle Aerospatiale,
a French Corporation; and
Societe De Construction d'Avions De Tourisme,
a French Corporation,
Defendants.

Civil No. 82-615-A

John George and Rose (sic) George,
Plaintiffs,

vs.

Seed & Grain Construction Co.,
an Iowa Corporation;
Dennis Jones, Charles V. Frederick,
Societe National Industrielle Aerospatiale,
a French Corporation,
Defendants.

Resistance to Motion for Protective Order and
Request for Oral Argument

COME NOW the Plaintiffs, Dennis Jones (Jones), John George (John) and Rosa George (Rosa), and for their Resistance to Defendants Motion for Protective Order pursuant to Rule 26(c) Federal Rules of Civil Procedure, state that:

1. Plaintiffs served Summons upon the Defendants as required by the Federal Rules of Civil Procedure and that Returns of Services are on file in this case verifying the fact that the Defendants were properly served as required.

2. Defendants, after being served in this case filed a General Appearance and Answer without contesting this Court's jurisdiction; either *in personam* or subject matter.

3. Defendants are now, and were at the time of the accident giving rise to this lawsuit, engaged in the advertising and selling of aircraft and their component parts in the stream of commerce in the United States (See attached Exhibit "A" advertising such business in a trade journal), and pursuant thereto the Defendants have advertised the existence of and listed a telephone number for an office located in Washington, D.C., thus establishing their presence in the United States.

4. Defendants have proceeded under the Federal Rules of Civil Procedure prior to this time and have never denied their application or want of subject matter or *in personam* jurisdiction of this Court.

5. This Court has both *in personam* and subject matter jurisdiction over the parties and issues involved in this lawsuit. Specifically, the Defendants have filed a General Appearance and Answer, they have filed Interrogatories direct to each Plaintiff, filed Requests for Production on several occasions directed to each Plaintiff, they have deposed witnesses and parties pursuant to the Federal Rules of Civil Procedure and have requested the right to examine the wreckage, also pursuant to the Federal Rules.

6. As this Court has *in personam* jurisdiction it may order foreign nationals to comply with the federal rules as any other person subject to *in personam* jurisdiction would be required to proceed.

7. *In personam* jurisdiction nullifies the application of the Hague Convention as by its express terms and this country's interpretation it only applies to taking evidence abroad.

8. This is true even though information or documents required may be kept in a foreign jurisdiction.

9. For the foregoing reasons, Plaintiffs request that the Court not enter an order requiring that Plaintiffs comply with the Hague Convention in seeking further discovery from the Defendants.

10. For the foregoing reasons, Plaintiffs also request that the Court allow oral argument on the issue of whether the Plaintiffs should be required to proceed under the Hague Convention.

WHEREFORE, Plaintiff, Dennis Jones, John George and Rosa George, pray that this Court not enter a Protective Order as requested by the Defendants, and that Oral Argument be allowed on the issue of whether such an Order should be issued.

Respectfully submitted,

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In the United States District Court
For The Southern District of Iowa
Central Division

Civil No. 82-453-C

Dennis F. Jones,
Plaintiff,

v.

Societe Nationale Industrielle Aerospatiale,
a French Corporation;
and Societe De Construction d'Avions De Tourisme,
a French Corporation,
Defendants.

Civil No. 82-615-A

John George and Rose (sic) George,
Plaintiffs,

v.

Seed and Grain Construction Co.
an Iowa Corporation;
Dennis Jones, Charles V. Frederick,
Societe National Industrielle Aerospatiale,
a French Corporation,
Defendants.

Brief in Support of Resistance to Motion for Protective Order
and Request for Oral Argument

The Defendants in this action seek to avoid further discovery on the ground that they are foreign corporations subject to the jurisdiction of a Signatory of the Hague Convention. According to the Defendants this means that the Plaintiffs must proceed with all further discovery in this case pursuant to the terms and requirements of the Hague Convention.

The facts of this case are similar to those of *In Re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985), which involved a third-party suit against the manufacturer of a steering device alleged to have malfunctioned causing the collision of three ships. The third-party

defendants in *Anschuetz* moved for a Protective Order with regard to Interrogatories, Requests for Production and the taking of depositions. The initial motion in *Anschuetz* was not based on the Hague Convention. The subsequent motion was however based on the Hague Convention. The Court concluded that: "the Hague Convention does not supplant the application of the discovery provisions of the Federal Rules over foreign, Hague Convention state nationals, subject to *in personam* jurisdiction in a United States Court." *Anschuetz* at 604.

In reaching this decision the Fifth Circuit Court carefully analyzed existing precedent. *Id.* at 605-06. The Court noted that the view that the Hague Convention should be strictly applied arose out of two California cases based on California law and policy. *Id.* at 606. These two California cases, *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App.3d 238, 186 Cal. Rptr. 876 (1982) (sic) and *Pierburg GmbH & Co. v. Superior Court*, 137 Cal. App.3d 238, 186 Cal. Rptr. 876 (1982), did not base their decisions on legal requirements, but rather on notions of comity and judicial self-restraint. *Anschuetz*, at 606. According to the *Anschuetz* Court neither of these cases, or those following them, indicate that the Hague Convention strictly applied where the Court had *in personam* jurisdiction with regard to all of the parties. *Id.* The Court recognized that this would give foreign nationals an extreme advantage; they could seek discovery under the Federal Rules but other parties would have to proceed with discovery against them under the much more restrictive Hague Convention. *Id.* The Court therefore recognizes that the procedures allowed under the Hague Convention are not exclusive. *Id.* at 612.

Furthermore, it is well established that "[d]ocuments need not be in the possession of a party to be discoverable, they need only be in its custody or control." *Id.* at 607. Quoting, *Cooper Industries v. British Aerospace*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984). In *Cooper* the plaintiff sought such things as service manuals and blueprints of aircraft. *Anschuetz*, at 607. The Court allowed the discovery as the documents all "relate[d] to the planes that [the] defendants work with every day..." and defendant could get them with no difficulty. *Id.* The Court also

stated that it is irrelevant that the documents are in another country. *Id.* This was due to the fact that the documents were to be produced in the United States and thus there was no violation of foreign sovereignty as the discovery did not take place in the foreign country (as was the situation in the two California cases cited earlier). *Id.*

The Court felt that "foreign parties and domestic parties are equally subject to the Federal Rules of Civil Procedure so long as personal jurisdiction is gained. *Id.* The only obstacle may be comity, but comity is not a binding obligation. *Id.* at 609. What is required is a balancing of interests in such cases. *Id.* The Hague Convention was not intended to shield foreign nationals from American judicial processes where the person does business in this country. *Id.* at 611. "[T]he Convention does not require deference to a foreign country's judicial sovereignty... when such documents are to be produced in the United States. *Id.* Discovery is considered to occur where the request is made not where the information is retained or necessarily gathered. *Id.* The gathering of documents and information is merely "preparatory" to discovery. *Id.* Such evidence is a crucial part of most cases and requiring compliance with the Hague Convention in every case would totally alter the way litigation in a multinational situation is conducted. *Id.* at 612. If the Convention were deemed the exclusive means of gathering evidence in such cases "foreign authorities [would be] the final arbiters of" the evidence their nationals could be compelled to provide. *Id.* Also, if the Convention were interpreted in this manner the foreign country could regulate the litigation "unilaterally". *Id.*

The Federal Rules were designed to, and do, give all parties before federal courts very expansive discovery rights. *Id.* at 614. This is not to say the Rules should always be strictly enforced because foreign jurisdictions must be respected. *Id.* This respect should be paid even though the Convention is not expressly exclusive (as is the Convention on Service). *Id.* The only time the Hague convention is exclusive is when the party is not subject to the Court's *in personam* jurisdiction. *Id.* It is not applicable at all if the evidence sought is sought in this country and sought of a party subject to the Court's *in personam* jurisdiction. *Id.*

The Court, in *Anschuetz*, gave the party the option of voluntarily producing the evidence in the foreign country or under threat of sanction in this country. *Id.* at 615. The same option should be available in this case, but the clear statement and holding of the law is that such evidence must be produced at one place or the other.

Furthermore, in light of the Defendant's extensive use of the Federal Rules of Civil Procedure as outlined in paragraph four (4) of the Resistance to Motion for Protective Order and Request for Oral Argument, and the United States hesitancy to allow such one-sided advantage, as is evidenced in *Anschuetz*, it is clear that the Defendants should not be allowed to make extensive use of the Federal Rules and then hide behind the Hague Convention. This is especially true when the Court considers that they have *in personam* jurisdiction over the parties as established above. Surely this is just the type of situation the Court foresaw in *Anschuetz* when they decided such an abuse could not be allowed. Therefore, the Defendants should be subject to the Federal Rules of Civil Procedure just as the Plaintiffs are.

As there seems to be a good deal of disagreement as to whether the Plaintiffs should be required to proceed under the Hague Convention, Oral Argument seems to be in order. Therefore, the Plaintiffs would also request that such Oral Argument be set in this case with regard to whether the Plaintiffs should be forced to proceed under the Hague Convention while the Defendants proceed under the full range of discovery allowed the Federal Rules of Civil Procedure.

Respectfully submitted,

/s/ ROLAND D. PEDDICORD

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Attorney for Dennis Jones

In the United States District Court
for the Southern District of Iowa
Central Division

Civil No. 82-615-A

John George and Rosa George,
Plaintiffs,

vs.

Seed & Grain Construction Co.,
an Iowa corporation; Dennis Jones; Charles V. Frederick;
Societe Nationale Industrielle Aero-Spatiale,
a French corporation;
and Societe de Construction d'Avions de Tourisme,
a French corporation;
Defendants.

Request for Production Directed to Defendant Societe National
Industrielle Aero-Spatiale and Societe de Construction
d'Avions de Tourisme (1st Set)*

COME NOW the Plaintiffs and pursuant to Federal Rules of Civil Procedure, Rule 34(b), hereby request the defendants, Societe Nationale Industrielle Aero-Spatiale and Societe de Construction d'Avions de Tourisme, and each of them, to produce for inspection and copying the following list of documents and things at the office of Verne Lawyer, 427 Fleming Building, Des Moines, Iowa 50309 during usual business hours within a reasonable time (not to exceed 30 days) after service of this document upon you.

1. Produce the applicable pilot's handbook for the S.O.C.A.T.A. Morane Saulnier 893E Rallye model aircraft, serial number 12451, F.A.A. registration number N96088, which is the subject of this lawsuit.

2. Produce the applicable flight manual for the S.O.C.A.T.A. Morane Saulnier 893E Rallye model aircraft, serial number 12451, F.A.A. registration number N96088, which is the subject of this lawsuit.

* Identical discovery request also served by plaintiff Dennis Jones.

3. Produce the performance data on the power required and power available and climb performance for the S.O.C.A.T.A. Morane Saulnier 893E Rallye model aircraft, serial number 12451, F.A.A. registration number N96088, which is the subject of this lawsuit.

4. Produce any and all records or data with regard to how the aircraft, the S.O.C.A.T.A. Morane Saulnier 893E Rallye model aircraft, serial number 12451, F.A.A. registration number N96088, was certified for flight in the United States and with the United States Registry.

5. Produce any and all records or data which proves the aircraft, the S.O.C.A.T.A. Morane Saulnier 893E Rallye model aircraft, serial number 12451, F.A.A. registration number N96088 met the requirements of Part 23 of the Code of Federal Regulations.

6. Produce any and all records or data with regard to any testing that was done pursuant to Part 23 of the Code of Federal Regulations.

7. Produce any and all records or data with regard to testing done by the F.A.A. on the S.O.C.A.T.A. Morane Saulnier 893E Rallye model aircraft, serial number 12451, F.A.A. Registration number N96088.

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By /s/ VERNE LAWYER

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In the United States District Court
For the Southern District of Iowa
Central Division

Civil No. 82-453-C Consolidated

Dennis F. Jones,
Plaintiff,

vs.

Societe Nationale Industrielle Aerospatiale,
a French corporation; et al.
Defendants.

Civil No. 82-615-A

John George and Rosa George,
Plaintiffs,

vs.

Seed & Grain Construction Co.,
an Iowa corporation; Dennis Jones;
Charles V. Fredererick (sic);
Societe Nationale Industrielle Aerospatiale,
a French corporation;
and Societe de Construction d'Avions de Tourisme,
a French corporation;
Defendants.

Request for Admissions Directed to Defendants
Societe Nationale Industrielle Aerospatiale and
Societe de Construction d'Avions de Tourisme*

COME NOW Plaintiffs John George and Rosa George and pursuant to Federal Rule of Civil Procedure 36 request the defendants Societe Nationale Industrielle Aerospatiale and Societe De Construction d'Avions de Tourisme, within 30 days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

* Identical discovery request also served by plaintiff Dennis Jones.

1. That each of the following documents, exhibited with this request, is genuine.

- a. Advertisement No. 1, which appeared in the December 1973 issue of "Flying" magazine.
- b. Advertisement No. 2, which appeared in the November 1977 issue of "Private Pilot" magazine.
- c. Advertisement No. 3, which appeared in the April 1978 issue of "Private Pilot" magazine.
- d. Advertisement No. 4, which appeared in the May 1978 issue of "Private Pilot" magazine.
- e. Advertisement No. 5, which appeared in the November 1978 issue of "Private Pilot" magazine.
- f. Advertisement No. 6, which appeared in the December 1978 issue of "Private Pilot" magazine.
- g. Advertisement No. 7, which appeared in the November 1977 issue of "Flying" magazine.

2. That each of the following statements is true.

- a. That the Defendants, French Corporations, were aware, at and before the time of publishing the advertisements, of the contents and statements contained in the advertisements.
- b. That RALLYE Aircraft Corporation located at 485 Madison Avenue, New York, New York 10022 was, in 1977 and 1978, a New York corporation, incorporated by and was a subsidiary of the Defendant Aerospatiale Company.
- c. That Defendant Aerospatiale Corporation publicly claimed in December 1973 that the RALLYE was "the world's safest . . . STOL plane".
- d. That Defendant Aerospatiale Corporation publicly claimed in November 1977 that the RALLYE aircraft was a STOL aircraft.
- e. That in November 1977 the term "STOL" stood for "short take-off and landing" performance.

f. That the Defendant Aerospatiale Corporation in November 1977 publicly claimed "RALLYE combines the challenge of flying with the safety of an aircraft that 'forgives and forgets'".

g. That Defendant Aerospatiale Corporation publicly claimed in November 1977 that with the RALLYE aircraft "Difficult approaches and short fields are no longer a concern."

h. That Defendant Aerospatiale Corporation in November 1978 publicly claimed that "With RALLYE, even low-time pilots can fly STOL on difficult approaches and short, unprepared landing strips."

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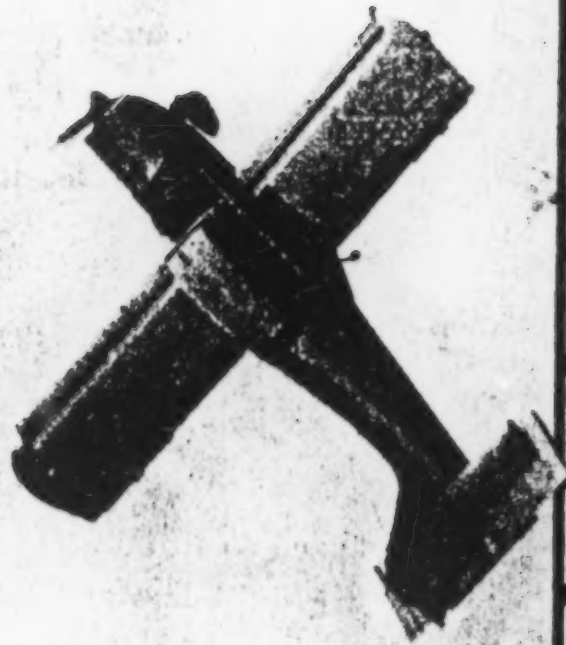
Telephone: (515) 243-3236

Attorneys for Plaintiffs

RALLYE

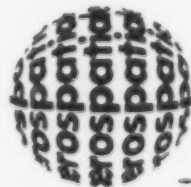
UNMATCHED SAFETY

A-24



With the RALLYE, you really relax. You know you can rely at all times on the automatic movable leading edge slats. Added to these slats, the RALLYE's wide-span slotted flaps make it quite definitely the world's safest and most economical STOL plane.

60 countries have already chosen the RALLYE.



groupe aerospatiale - aviation générale

37, bd de Montmorency - 75781 PARIS Cedex 16 - FRANCE

AEROSPATIALE U.S. DELEGATE :

Robert SOUSSI

c/o AIR CENTER INC., Wiley Post Airport

P.O. Box 32168 OKLAHOMA CITY - OK. 73132

Phone 405 / 789 40 20

SALES AND SERVICE SUPPORT :

HIPAC : Paul C. MITCHELL

P.O. Box 1021 - RUTHERFORDTON, N.C. 28139

Phone 704 / 287 46 54

RALLYE

A-25



STOL Performance...STOL Versatility... STOL Safety

**designed and crafted into every RALLYE model
for sport, aerobatic, training, pleasure and business flying**

"RALLYE sets you free." That's the quick conclusion you come to as you break ground in less than 500 feet on STOL takeoff, knowing that the landing roll is even less. Difficult approaches and short fields are no longer a concern. In flight the antistall, full-span, automatic, leading-edge slats, the slotted Fowler flaps and the generously sized control surfaces endow all RALLYES with exceptional low speed and STOL handling characteristics for maximum safe maneuverability and response.

In short, RALLYE combines the challenge of flying with the safety of an aircraft that "forgives and forgets."

And the RALLYE is a proven aircraft with over 15 years of design refinement for multipurpose adaptability, rugged durability, and operating economy.

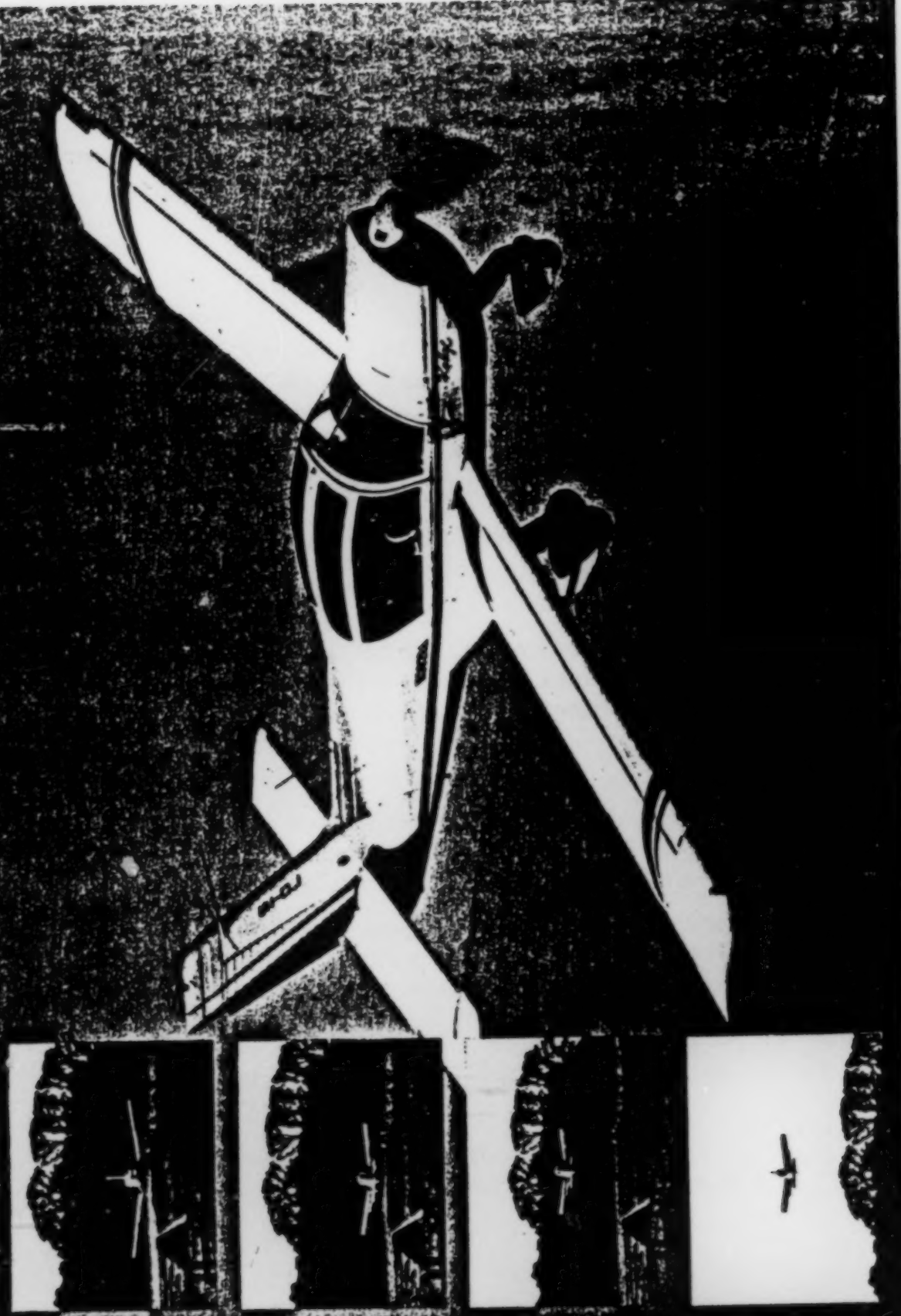
For the name of your nearest RALLYE distributor in our expanding network contact:

RALLYE AIRCRAFT CORPORATION

an AEROSPATIALE company

485 MADISON AVENUE
NEW YORK, NY 10022
PHONE: 212 688-0019





500 feet to freedom

Introducing the 1978 line of RALLYE STOL Aircraft

You are just 500 feet from the most exciting flying experience of your life. For with the RALLYE STOLs for 1978, you need less than 500 feet of take-off roll and even less for landing!

The 1978 RALLYE STOLs bring fun and adventure back to flying. Automatic anti-stall Handley Page leading edge slats, slotted Fowler flaps, and extra-large rudder and elevator provide full control, even at the stall speed. All these features combine to deliver the most breathtaking STOL performance, together with the highest degree of SAFETY to be found in private aviation anywhere in the world today.

Other Special features:

- rugged anti-corrosion treated, all-metal airframe (made by the French manufacturer of CONCORDE)
- reliable U.S. Lycoming engine that powers each RALLYE model
- panoramic sliding canopy which, united with

the low-wing design, provides all-around visibility in every flight configuration.

With a RALLYE, difficult approaches and short, unprepared landing strips are no longer a concern. The aircraft is so easy to fly and so forgiving that even low-time pilots can fly STOL with RALLYE. The RALLYE STOLs truly open a whole new dimension in sport and business flying. Look at these performance specs.

| | Take off roll | Landing roll | Cross-wind |
|--------------|---------------|--------------|--------------|
| RALLYE 150ST | 420 ft. | 390 ft. | 20 kts at 90 |
| RALLYE 1800T | 445 ft. | 410 ft. | 20 kts at 90 |
| RALLYE 2350T | 490 ft. | 425 ft. | 25 kts at 90 |

That's why, in the last 17 years, one out of every five aircraft owners in Europe has chosen RALLYE!

The RALLYE 150ST, fully spin-certified and equipped with the traditional World War II style stick, is the ideal low-cost multi-purpose workhorse of the professionals in light aviation—for flight train-

ing, aircraft rental, glider and banner towing, aerial surveillance, aerial photography, and more!

The top of the line RALLYE 235GT offers power, luxury, silence and comfort for the most demanding cross-country sport or business flyer. And, with this kind of STOL performance, business flying is all the fun you always wanted it to be.

And backing every feature is something just as important: SERVICE! Our U.S. assembly partner, RALEIGH-DURHAM AVIATION, is now ready to deliver RALLYE parts from its complete spare parts inventory in North Carolina to any point in North America within 48 hours.

Test fly a 1978 RALLYE STOL, and rediscover the adventure of flying. You'll be just 500 feet from freedom.

For more information and the name of your nearest RALLYE dealer, write to:

RALLYE AIRCRAFT CORPORATION
485 Madison Avenue (Suite 206)
New York, New York 10022
or call: toll free (800) 223-0585



Alaska

Ramco
Anchorage, AK (907) 344-2911

California (South)

California Aero Sales
Riverside, CA (714) 689-5021

California (North)

Flying Country Club Marketing, Inc.
San Jose, CA (408) 259-3360

Florida

Chemair Spray Inc.
Palmokee, FL (305) 924-5931

Mississippi

Johnson-Weiss Aviation
Jackson, MS (601) 856-8848

Nevada

Ben Parker Co.
Carson City, NV (702) 882-2133

New England

Kensington Aircraft Ltd., Inc.
Newburyport, MA (617) 462-7070

New Jersey

Teterboro Int'l Aircraft Sales, Inc.
Teterboro, NJ (201) 288-2444

Texas

Everage Enterprises, Inc.
Houston, TX (713) 688-5260

Washington

Fancher Airways
Renton, WA (206) 226-6170

In The United States District Court
For the Southern District of Iowa
Central Division

CV No. 82-453-C

Dennis F. Jones,
Plaintiff,

v.

Societe Nationale Industrielle Aerospatiale,
a French Corporation; and Societe de Construction
d'Avions de Tourisme, a French Corporation,
Defendants.

CV No. 82-615-A

John George and Rosa George,
Plaintiffs,

v.

Seed & Grain Construction Co., an Iowa Corporation;
Dennis Jones, Charles V. Frederick,
Societe Nationale Industrielle Aerospatiale,
a French Corporation,
Defendants.

Second Request for Production Directed to
Societe National Industrielle Aerospatiale and
Societe de Construction d'Avions de Tourisme

COMES NOW the Plaintiff, Dennis F. Jones, and pursuant to Federal Rule of Civil Procedure, request the Defendants, Societe Nationale Industrielle Aerospatiale and Societe De Construction d'Avions De Tourisme, within 30 days after service of this request, to produce the following documents and records for inspection and/or copying by Plaintiff's attorney, 300 Fleming Building, Des Moines, Iowa, to wit:

1. The production flight test records for the subject Rallye aircraft to wit: Rallye MS893E, bearing U.S. registration No. N96088.

2. The aircraft modification/inspection workbook for the subject Rallye aircraft, being Rallye MS893E, bearing U.S. registration No. N96088.
3. The aircraft configuration/inspection workbook for the subject Rallye aircraft, being Rallye MS893E, bearing U.S. registration No. N96088.
4. The aircraft weight and balance worksheet for the subject Rallye aircraft, being Rallye MS893E, bearing U.S. registration No. N90688.
5. The aircraft weight record for the subject Rallye aircraft, being Rallye MS893E, bearing U.S. registration No. N90688.
6. The aircraft weighing record for the subject Rallye aircraft, being Rallye MS893E, bearing U.S. registration No. N90688.
7. The flight test loading report for the Rallye type aircraft manufactured by the Defendants.
8. The operation and inspection records concerning the construction of the subject Rallye aircraft being Rallye MS893E, bearing U.S. registration No. N96088.
9. All inspection squak (sic) sheets for the subject Rallye aircraft being Rallye MS893E, bearing U.S. registration No. N96088.
10. The rejection/disposition reports for the subject Rallye aircraft, being Rallye MS893E, bearing U.S. registration No. N96088.
11. The shortage report and deviation summary for the subject Rallye aircraft, being Rallye MS893E, bearing U.S. registration No. N96088.
12. The index of changes logged and operation and inspection records for the subject Rallye aircraft, being Rallye MS893E, bearing U.S. registration No. N96088.
13. Any other aircraft modification kits (A.M.K's) applicable to the subject aircraft being Rallye MS893E, bearing U.S. registration No. N90688.

14. All appropriate test inspection records (T.I.R.'s) for the Rallye type aircraft.
15. The instrument panel drawing and layout of the instruments for the subject Rallye aircraft, being Rallye MS893E, bearing U.S. registration No. N96088.
16. The design specifications, line drawings and engineering plans and all engineering change orders and plans and all drawings concerning the leading edge slats for the Rallye type aircraft manufactured by the Defendants.
17. The design specifications, line drawings and engineering plans and all engineering change orders and plans and drawings concerning the flaps of the Rallye type aircraft manufactured by the Defendants.
18. AIR 2052 Regulation referred to in the Pilots Operation Manual published by the Defendants for the Rallye type aircraft.
19. The Defendants' "SOCATA service N°-117 referred to in the Defendants' Pilots Operation Manual for the Rallye type aircraft.

WHEREFORE, the Plaintiff, Dennis F. Jones request (sic) the Defendants above named, produce for inspection and/or copying all of the above records and documents at the office of Plaintiff's attorney.

PEDDICORD & WHARTON

/s/ ROLAND D. PEDDICORD

Roland D. Peddicord
Suite 300, Fleming Building
218 Sixth Avenue
Des Moines, Iowa 50309
ATTORNEY FOR
DENNIS F. JONES

In the United States District Court
For the Southern District of Iowa
Central Division

Civil No. 82-453-C Consolidated

Dennis F. Jones,
Plaintiff,

vs.

Societe Nationale Industrielle Aerospatiale,
a French corporation; et al.
Defendants.

Civil No. 82-615-A

John George and Rosa George,
Plaintiffs,

vs.

Seed & Grain Construction Co.,
an Iowa corporation; Dennis Jones;
Charles V. Fredererick (sic);
Societe Nationale Industrielle Aerospatiale,
a French corporation;
and Societe de Construction d'Avions de Tourisme
a French corporation;
Defendants.

Plaintiffs John George and Rosa George's
Interrogatories Directed to Defendants Societe Nationale
Industrielle Aerospatiale
and Societe de Construction d'Avions de Tourisme,
and Each of Them (1st Set)

COME NOW the Plaintiffs, and pursuant to Rule 33 of the Federal Rules of Civil Procedure, hereby file in said case the following interrogatories to be answered under oath by the Defendants, *and each of them*, inasmuch as answer to said interrogatories is necessary to enable these Plaintiffs to adequately prepare for trial. These interrogatories are to be supplemented pursuant to the Federal Rules of Civil Procedure, and if further or different information from answers is available to the Defendants, Defend-

ants' attorney or agent, to whom these interrogatories are directed, such information is requested to be forwarded to the attorneys for the Plaintiffs. Where knowledge or information in possession of a Defendant is requested, such request includes knowledge of the party's agent, representative and, unless privileged, Defendants' attorney.

LAW OFFICES OF VERNE LAWYER

By /s/ VERNE LAWYER

Verne Lawyer
Fourth Floor Fleming Bldg.
Des Moines, IA 50309
Telephone: (515) 288-2213

-and-

Frank Wattson, Jr.
Seery & Dollar
516 Equitable Bldg.
Des Moines, IA 50309
Telephone: (515) 243-3236
Attorneys for Plaintiffs

1. With regard to the advertisement which appeared in the December 1973 issue of "Flying" magazine, identified as Advertisement No. 1 in the Plaintiffs' Request for Admissions Directed to the Defendant French Corporations, please state the following:

a. Is the photograph a composite photograph or "paste-up" photograph?

ANSWER:

If the answer to the proceeding question is in the negative, please state the following:

a. Where was the picture depicted in the advertisement No. 1 taken; that is, at what location in the world.

b. When was the picture depicted in the Advertisement No. 1 taken; that is, what date was it taken.

c. Please state the name and current address of the photographer who took the photograph depicted in Advertisement No. 1.

d. State the name and current address of the pilot who was piloting the aircraft at the time the photograph was taken.

e. Please provide the name of the advertising agency or agencies that were responsible for the preparation of the Advertisement No. 1.

ANSWER:

2. Your attention is directed to the RALLYE ad which appeared in the November 1977 issue of "Flying" magazine and in connection with such ad, please provide:

a. the identity of the person or persons, including the current address, who concocted the words contained in said ad, including the words, but not limited to "Difficult approaches and short fields are no longer a concern".

b. In that connection, please describe in detail and provide the basis for making such a statement and representation; describe the analytical data or the flight tests which were conducted to justify said statement.

c. the identity of the person or persons, including current address, who concocted the words contained in said ad, "In short, RALLYE combines the challenge of flying with the safety of an aircraft that 'forgives and forgets'".

d. In that connection, please describe in detail and provide the basis for the making of said statement and representation; describe the analytical data or the flight tests which were conducted to justify the statement "an aircraft that 'forgives and forgets'".

ANSWER:

3. Your attention is directed to the RALLYE ad which appeared in the April 1978 issue of "Flying" magazine and in connection with such ad, please provide:

- a. the identity of the person or persons, including the current address, who wrote the words contained in said ad, and
- b. In that connection, please describe the analytical data, other data or flight tests which were performed to justify the statement "All these features combine to deliver the most breathtaking STOL performance, together with the highest degree of SAFETY to be found in private aviation anywhere in the world today."
- c. the identity of the person or persons, including current address, who concocted the words contained in said ad, "The aircraft is so easy to fly and so forgiving that even low-time pilots can fly STOL with RALLYE."
- d. In that connection, please describe in detail the analytical data or test flight results which you say justify the making of such public statement and representations.

ANSWER: _____

4. Please provide the identity of the person or persons who concocted the words "The RALLYE STOLs truly open a whole new dimension in sport and business flying. Look at these performance specs:

| | Take off roll | Landing roll | Crosswind |
|--------------------|---------------|--------------|----------------------|
| RALLYE 180 GT..... | 445 feet | 410 feet | 20 kts at 90 feet |

In that connection, please provide:

- a. a complete description of the analytical data which was used to justify such representation or the flight test results which you say justify making such representation; and further provide:
- b. the serial number of the aircraft used, if indeed one was used, in conducting flight tests which you say justify making this statement:
- c. the gross weight of the aircraft used in conducting such flight tests;
- d. the name or names of the pilots who flew the flight test or tests;
- e. the mean sea level altitude of the airport from which such flight tests were conducted:
- f. the temperature at which such flight tests were conducted; and
- g. describe in detail the test data which you say justifies the making of the statement as contained in said advertisement.

ANSWER:

In the United States District Court
for the Southern District of Iowa
Central Division

Civil No. 82-453-C
Consolidated

Dennis F. Jones,
Plaintiff,

vs.

Societe Nationale Industrielle Aerospatiale,
a French corporation; et al.
Defendants.

Civil No. 82-615-A

John George and Rosa George,
Plaintiffs,

vs.

Seed & Grain Construction Co.,
an Iowa corporation; Dennis Jones; Charles V. Fredererick;
Societe Nationale Industrielle Aerospatiale,
a French corporation;
and Societe de Construction d'Avions de Tourisme,
a French corporation;
Defendants.

Plaintiffs John George and Rosa George's Second Set of
Request for Admissions Directed to Defendants Societe
Nationale Industrielle Aerospatiale and Societe de Construction
d'Avions de Tourisme

COME NOW Plaintiffs John George and Rosa George and
pursuant to Federal Rule of Civil Procedure 36 request the
defendants Societe Nationale Industrielle Aerospatiale and So-
ciete de Construction d'Avions de Tourisme, within 30 days after
service of this request to make the following admissions for the
purpose of this action only and subject to all pertinent objections
to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this
request, is genuine.

- a. Advertisement No. 8, which appeared in the March 1978 issue of "Pilot" Magazine.
 - b. Advertisement No. 9, which appeared in the June 1978 issue of "Pilot" Magazine.
 - c. Advertisement No. 10, which appeared in the October 1978 issue of "Pilot" Magazine.
 - d. Advertisement No. 11, which appeared in the December 1978 issue of "Pilot" Magazine.
 - e. Advertisement No. 12, which appeared in the March 1979 issue of "Pilot" Magazine.
 - f. Advertisement No. 13, which appeared in the April 1979 issues of "Flying" Magazine.
2. That each of the following statements is false.
- a. "RALLYE lengthens the runway—automatically."
 - b. "RALLYE lowers the temperature—automatically".
 - c. "RALLYE lightens the load—automatically".

LAW OFFICES OF VERNE LAWYER

By /s/ VERNE LAWYER

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Fourth Floor Fleming Building
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Telephone: (515) 288-2213

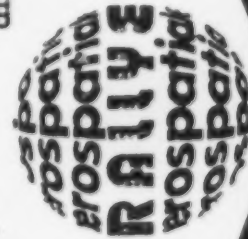
-and-

Frank Watson, Jr.
Seery & Dollar
516 Equitable Bldg.
Des Moines, IA 50309
Telephone: (515) 243-3236
Attorneys for Plaintiffs



RALLYE
*lengthens the runway,
 lowers the temperature and
 lightens the load.
 Automatically.*

Rallye expands your horizons when you need it most: hot days, short field, airplane loaded to gross weight. And while the high performance characteristics of the Rallye may not be part of your everyday flight plan, the roomy, four place luxury makes it an ideal business tool. The 150 MPH cruise makes it a real cross country machine. And the sleek good looks will turn heads when you get there. Here, at last, is a STOL aircraft that's not a compromise.



When you have to get up in a hurry, get there in a hurry and get down in a hurry, there's just one answer - Rallye! Because the high performance STOL features are there when you need them - the full-span leading edge slats deploy automatically when the angle of attack is high enough, then retract silently when it decreases. Rallye - the cross country airplane that expands your horizons when you need it most. For more information and the name of your nearest dealer, call us, toll free: 800-334-5870.

RALLYE AIRCRAFT CORPORATION
 Rt. 1, Box 484B Morrisville, North Carolina 27560
 North Carolina residents phone 919/781-5600

CIRCLE NO. 137 ON READER SERVICE CARD

CORRECTED COPY

No. 85-1695

18

Supreme Court, U.S.

FILED

AUG 22 1986

JOSEPH F. SPANIOL, JR.
CLERK

**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1985

SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE AND
SOCIÉTÉ DE CONSTRUCTION D'AVIONS DE TOURISME,
Petitioners,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
REAL PARTIES IN INTEREST)

**On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit**

BRIEF FOR PETITIONERS

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August 22, 1986

5748

QUESTIONS PRESENTED

1. Is the Hague Evidence Convention¹ applicable to the discovery of documentary evidence and information located abroad from a foreign national over whom a U.S. court has personal jurisdiction?

2. Where the Hague Evidence Convention applies, does treating its procedures as merely optional frustrate its purpose?

3. Where the Hague Evidence Convention applies, does a particularized analysis of comity considerations generally require courts to make use of its procedures?

¹Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974).

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No. 85-1695

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1985

SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE AND
SOCIÉTÉ DE CONSTRUCTION D'AVIONS DE TOURISME,
Petitioners,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
REAL PARTIES IN INTEREST)

**On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit**

BRIEF FOR PETITIONERS

Petitioners Société Nationale Industrielle Aérospatiale ("SNIAS") and Société de Construction d'Avions de Tourisme ("SOCATA") respectfully submit this brief on the merits.²

²In response to Rule 28.1, Petitioners state the following: Petitioner Société de Construction d'Avions de Tourisme is a wholly-owned subsidiary of Petitioner Société Nationale Industrielle Aérospatiale. Petitioners have no other affiliates or subsidiaries which are not wholly-owned.

In addition to the parties shown in the caption, Seed & Grain Construction Co. is a party in the district court proceedings. It did not participate in the writ proceedings before the Eighth Circuit nor has it appeared in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals, reported at 782 F.2d 120 (8th Cir. 1986), is reprinted in the appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a. The order of the magistrate, which is unreported, is reprinted there at 11a.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1986. The petition for a writ of certiorari was filed on April 16, 1986 and was granted on June 9, 1986. The Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

This case concerns the construction and purpose of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974) ("Hague Evidence Convention" or "Convention") and the interplay between the Hague Evidence Convention, the Federal Rules of Civil Procedure, and French Penal Code Law No. 80-538. The Hague Evidence Convention is reproduced at Pet. App. 26a. Rules 33, 34 and 36 of the Federal Rules of Civil Procedure are reproduced at Pet. App. 42a. French Penal Code Law No. 80-538 ("French Blocking Statute") and an official translation thereof are reproduced at Pet. App. 47a.

STATEMENT

Petitioners are corporations based in France presently defending two related products liability actions in a federal district court. When presented with demands for documents and information available only from sources in France, petitioners informed plaintiffs that such requests must be made through the procedures of the Hague Evidence Convention. Plaintiffs did not attempt to use the Convention's procedures but instead persisted in their discovery demands under the federal rules. Petitioners then sought a

protective order to require plaintiffs' compliance with the terms of the treaty. The magistrate denied the motion, and the court below affirmed on the mistaken belief that the Convention does not apply to production of the evidence here in question. 782 F.2d at 124, Pet. App. 4a.

The Hague Evidence Convention. The Convention is a multi-lateral treaty which provides methods for litigants in civil and commercial disputes to obtain evidence from abroad. It is intended to help lessen the procedural obstacles encountered when litigants seek evidence located in a foreign country having a legal system different from our own and, in particular, to bridge the significant differences between the common law and civil law approaches to the gathering of evidence.³ There are at present seventeen parties to the Convention including the United States and France.⁴

1. The Convention is a product of the Hague Conference on Private International Law, an association of sovereign nations whose purpose is to "work for the progressive unification of the rules of private international law."⁵ It is based on the principle

³See S. Exec. A, 92d Cong., 2d Sess. VI (1972) (hereinafter cited as *Convention Transmittal*); S. Exec. Rep. No. 25, 92nd Cong., 2d Sess. 1 (1972) (hereinafter cited as *Senate Foreign Relations Committee Report*); *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law*, reprinted in 8 Int'l Legal Materials 785, 806 (1969) (hereinafter cited as *1969 U.S. Hague Delegation Report*); Amram, *Report on the Eleventh Session of the Hague Conference on Private International Law*, 63 Am. J. Int'l L. 521 526 (1969).

⁴Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, United Kingdom and the United States. VII *Martindale-Hubbell Law Directory*, Part VII at 14-15 (1986) (hereinafter cited as *Martindale-Hubbell*).

⁵Statute of the Hague Conference on Private International Law, art. 1, *opened for signature*, October 31, 1951, 15 U.S.T. 2228, T.I.A.S. No. 5710, 220 U.N.T.S. 121 (entered into force for the United States October 15, 1964).

that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." *Convention Transmittal* at 11. Twenty-five nations participated in the Convention's drafting; the great majority of these participants, and of the current parties, are civil law nations.

In civil law nations, including France, fact-gathering is a judicially controlled process in which the ability of litigants to fish for potentially relevant information is much more carefully circumscribed than in U.S. courts. The court, rather than the parties' lawyers, takes the main responsibility for gathering and

Mutual judicial assistance has been a major focus of the Hague Conference since its inception. At the Second Conference, held in 1894, the first multilateral convention on civil procedure was drafted. It included detailed rules regarding the execution of requests for judicial assistance. This first convention was superseded by the 1905 Civil Procedure Convention, which ultimately was adopted by 15 European nations and remained in force for many of the parties for over 50 years. In 1954, the Conference adopted a revised and modernized version of the earlier convention. The 1954 Convention addresses three topics: service of process; taking of evidence; and legal aid. The 1954 Convention was ultimately adopted by some 28 states and continues in force between some of them.

The United States was not a party to either of these earlier conventions and did not participate in their drafting. In 1963, at the urging of the Executive Branch, Congress passed and the President signed a Joint Resolution authorizing the United States to participate in the Hague Conference. The United States first participated as a full member at the Conference's Tenth Session in October 1964. The Tenth Session resulted in the adoption of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *done at the Hague*, November 16, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163. Encouraged by its diplomatic success in achieving consensus upon a service convention, the United States urged consideration of an evidence convention at the next session of the Hague Conference. See generally B. Ristau, 1 *International Judicial Assistance (Civil and Commercial)* §§ 1-2 (1984); Nadelmann, *The United States Joins the Hague Conference on Private International Law: A "History" with Comments*, 30 *Law & Contemp. Probs.* 291 (1965).

sifting evidence. In the civil procedure of these nations, trial is not a single discrete event distinct from pretrial discovery. Instead, the court gathers and evaluates evidence over a series of hearings.⁶ Because evidence gathering in civil law nations is a judicial function, these nations generally regard the nonjudicial taking of evidence located in their territory 'as' an affront to their sovereignty. When an American attorney attempts to obtain evidence located in a civil law nation without passing through the foreign nation's courts, the judicial sovereignty of the civil law nation is violated, even if the evidence is offered voluntarily.⁷

The United States was instrumental in the drafting of the Hague Evidence Convention and was its main proponent, seeking to minimize the difficulties U.S. litigants encountered in obtaining evidence located in civil law nations.⁸ To accomplish this goal, the United States urged the Hague Conference to undertake revision of Part II of the 1954 Convention Relating to Civil Procedure⁹ (which concerns the taking of evidence) in order "to explore the availability of other techniques of obtaining testimony abroad, which overcome some or all of the disadvantages of letters rogatory."¹⁰

⁶ See J. Merryman, *The Civil Law Tradition* 111-19 (2d ed. 1985); J. Langbein, *The German Advantage in Civil Procedure*, 52 *U. Chi. L. Rev.* 823, 826-35 (1985); 1 *New Code of Civil Procedure in France* xxvi-xxxv (F. de Kerstrat & W. Crawford, trans. 1978).

⁷ The act of taking evidence from a willing witness in a civil law nation "may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the 'judicial sovereignty' of the host country, unless its authorities participate or give their consent." 1969 *U.S. Hague Delegation Report* at 806.

⁸ *Senate Foreign Relations Committee Report* at 1-2.

⁹ Convention Relating to Civil Procedure, *done at the Hague*, March 1, 1954, 286 U.N.T.S. 265.

¹⁰ Conférence de La Haye de Droit International Privé, *IV Actes et Documents de la Onzième Session, Obtention des Preuves à l'Étranger* 16 (Bureau Permanent de la Conférence ed. 1970) (hereinafter cited as *Convention History*).

Prior to the Hague Evidence Convention, letters rogatory were the principal means recognized by civil law nations for obtaining evidence located on their soil for use in foreign judicial proceedings.¹¹ The procedures for preparing and serving such letters were often technically cumbersome, execution could be refused on numerous grounds, and the evidence generated through this process was not always in a form utilizable in the courts of the nation where the request originated.¹²

The Convention liberalizes and simplifies former practices with respect to letters rogatory, which it terms "letters of request," and provides improved means for taking evidence abroad without the direct participation of the foreign judiciary. To further the U.S. objective of minimizing difficulties in obtaining evidence from abroad, article 27 of the Convention "[p]reserve[s] all more favorable and less restrictive practices arising from internal law, internal rules of procedure and bilateral or multilateral conventions."¹³

2. The Convention provides three alternative methods for taking evidence abroad for use in civil or commercial litigation. The first is the letter of request, by which a court of one nation through appropriate channels asks the courts of another to secure designated evidence. Arts. 1-14, Pet. App. 26a-31a. Second, evidence may be taken before a diplomatic or consular officer of the requesting State. Arts. 15-16, Pet. App. 31a-32a. Third, evidence may be taken before any person duly appointed as a commissioner for that purpose. Art. 17, Pet. App. 32a.

¹¹ *Convention Transmittal* at VI; Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 Am. J. Int'l L. 104, 105 (1973).

¹² *Memorandum of the United States with Respect to the Revision of Chapter II of the 1954 Convention on Civil Procedure* (hereinafter cited as *U.S. Memorandum*), reprinted in *Convention History* at 15.

¹³ *Senate Foreign Relations Committee Report* at 2. The United States makes available "more favorable and less restrictive practices" to foreign litigants pursuant to 28 U.S.C. § 1782, enacted in 1964 as part of Public Law 88-619.

As under prior practice, the letter of request is a principal method of obtaining evidence from a contracting State under the Convention.¹⁴ The signatories to the Convention have agreed that letters of request "shall be executed expeditiously" (art. 9, Pet. App. 29a), applying "appropriate measures of compulsion." (art. 10, Pet. App. 29a). To simplify and expedite the procedure, article 3 specifies what a letter of request must contain, and the parties have adopted recommended forms to assist in the preparation of letters.¹⁵

The Convention liberalizes former practice by requiring the judicial authority which executes a letter of request to defer to a request that a special method or procedure be followed unless such method or procedure is "incompatible" with the internal law of the State of execution or "impossible of performance." Art. 9, Pet. App. 29a. The Conference record makes clear that "incompatible" means more than simply "different" and that these exceptions are to be narrowly construed.¹⁶ This provision is designed to insure that the evidence obtained in response to the letter is utilizable in the requesting State.¹⁷

¹⁴ Amram, 67 Am. J. Int'l L. at 105.

¹⁵ *Report on the Work of the Special Commission on the Operation of the Convention of 16 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, June 12-15, 1978*, reprinted in 17 Int'l Legal Materials 1425, 1434-39 (1978) (hereinafter cited as *1978 Report on Convention Operation*); Martindale-Hubbell at 21.

¹⁶ Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (hereinafter cited as *Convention Explanatory Report*), appended to *Convention Transmittal* at 23-24, and reprinted in *Convention History* at 208; 1969 *U.S. Hague Delegation Report* at 810.

¹⁷ *Id.* The Nouveau Code de Procédure Civile ("New Code of Civil Procedure") enacted by France in 1975 contains specific provisions on international letters rogatory designed to implement the Convention procedures. Among these provisions are article 739, which permits letters of request to be executed in accordance with the instruction of a foreign court, and article 740, which permits foreign attorneys on authorization from the judge to examine witnesses. Article 739 denies

The grounds for refusing to execute a letter of request are narrow. Execution may be objected to if the letter does not comply with the provisions of the Convention. Art. 5, Pet. App. 28a.¹⁸ Otherwise, execution may be refused only to the extent (a) that "execution of the Letter does not fall within the functions of the [executing State's] judiciary," or (b) that the executing State "considers its sovereignty or security would be prejudiced thereby." Art. 12, Pet. App. 30a. Any objections to execution must be promptly communicated to the Requesting Authority. Art. 13, Pet. App. 30a.

One additional ground on which execution of a letter of request could potentially be refused is found in article 23, which permits a party to reserve the right not to execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." Pet. App. 34a. Although the Republic of France has entered a reservation of rights pursuant to article 23, this reservation does not apply to the discovery of documents through letters of request, provided that the documents requested are enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation. The request must, of course, also be consistent with the Convention's general requirements regarding the nature of the requesting authority and respect for the requested State's public policy.¹⁹

French courts the right to refuse execution of letters of request on the grounds of incompatibility. 1 *New Code of Civil Procedure in France* 153, 214 (F. de Kerstrat and W. Crawford, trans, 1978).

¹⁸I.e., execution may be objected to if the letter is outside the Convention's scope as defined in article 1, does not contain the information required by article 3, is not expressed in the language specified by the State of execution in accordance with article 4, or does not conform to some other bilateral agreement between the nations in question (art. 32).

¹⁹See Letter from the Ministry of Justice to the Ministry of Foreign Affairs annexed to the Brief of the Republic of France as Amicus Curiae.

Article 23 was first proposed by the United Kingdom²⁰ and was intended to prevent abusive discovery practices by preserving the declaring State's right to apply internal standards of relevance and materiality to overbroad letters of request.²¹ The language of article 23, however, is not aptly worded for this purpose and reflects a misunderstanding of the term "pre-trial discovery" and the role of pre-trial discovery in common law countries.²² The United Kingdom has therefore clarified its declaration under article 23 with a further statement that it understands this reservation to apply only to letters of request lacking in specific-

²⁰*Convention History* at 155. The article was adopted by a vote of twelve to three with two abstentions (the U.S. voting in favor; Germany, France and Switzerland voting against; Greece and Luxembourg abstaining). *Id.* at 177.

²¹1978 *Report on Convention Operation* at 1428; *Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 24 Int'l Legal Materials 1668, 1677 (1985) (hereinafter cited as 1985 *Report on Convention Operation*). All Convention signatories except the United States, Barbados, Czechoslovakia, and Israel have made a declaration under article 23. Many signatories, for example Norway and the United Kingdom, have expressly qualified their reservation, making it applicable only to requests which are overbroad and not specific. See *Martindale-Hubbell* at 15-19.

²²See 1978 *Report on Convention Operation* at 1427-28.

ity.²³ A majority of the contracting States are now prepared to limited their reservations in a similar manner.²⁴

So limited, article 23 is merely an extension of article 3's requirement that a letter of request specify the evidence to be obtained or the documents to be inspected. Pet. App. 27a. Even absent an article 23 declaration, a letter of request couched in sweeping and indefinite terms could be returned unexecuted for failure to comply with article 3.²⁵ In practice, however, refusals to execute letters of request have been infrequent.²⁶

In addition to the letter of request procedure, the Convention contains alternative methods of which respondents could also make use. Chapter II of the Convention liberalizes pre-Convention practices with respect to the permissibility of diplomatic and

²³The U.K. reservation states:

Her Majesty's Government further declares that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purpose of the foregoing Declaration as including any Letter of Request which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power. [*Martindale-Hubbell* at 19.]

²⁴1985 *Report on Convention Operation* at 1678.

²⁵*Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 17 Int'l Legal Materials 1417, 1424 (1978) (hereinafter cited as *1978 Report of U.S. Delegation on Convention Operation*).

²⁶1978 *Report on Convention Operation* at 1431. Petitioners know of no case in which a French court has refused to execute a letter of request.

consular officials taking evidence abroad.²⁷ It also introduces, in article 17, the use of private commissioners to take evidence, a practice previously not recognized in civil law nations.²⁸ "The evidentiary procedures which may be executed by diplomatic or consular officers are the same as those which may be carried out pursuant to a letter of request, namely depositions, written interrogatories, and production and inspection of documents and other physical items."²⁹ Likewise, private commissioners duly appointed in accordance with the terms of the Convention can exercise similar powers.³⁰ While the use of these alternative methods requires the permission of the State of execution,³¹ the State here in question, France, has given such permission liberally,³² and has made a specific declaration to facilitate the use of these methods.³³

In executing a letter of request, the State of execution is required by the Convention to use appropriate measures of compulsion. Art. 10, Pet. App. 29a. Although compulsion is available to facilitate the gathering of evidence under the alterna-

²⁷Under article 15 of the 1954 Convention Relating to Civil Procedure, letters of request are executed by a judicial authority unless bilateral conventions between the states involved allow execution by diplomatic or consular agents, or the executing state "does not object."

²⁸*Convention Transmittal* at VI, IX; *Report of the Special Commission* (hereinafter cited as *Special Commission Report*), reprinted in *Convention History*, at 68-69.

²⁹*Borel & Boyd, Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 Int'l Law. 35, 41 (1979).

³⁰*Id.* at 42.

³¹Arts. 16-17, Pet. App. 31a-32a.

³²*Borel & Boyd*, 13 Int'l Law. at 41-42.

³³*Martindale-Hubbell* at 16. The Brief of the Republic of France as Amicus Curiae describes in detail how foreign litigants can make use of the Convention's voluntary procedures to conduct discovery in France.

tive methods of Chapter II only for those states who so declare,³⁴ the Convention contains no requirement that a court of the requesting State forego appropriate sanctions against a party who unreasonably refuses to cooperate in voluntary procedures to which the State of execution has consented. In fact, the history of the Convention's negotiations suggests that, under such circumstances, sanctions might be appropriate.³⁵ In past litigation, SNIAS has cooperated with American litigants who chose to utilize a consular official or private commissioner to take evidence in France.³⁶

³⁴ Art. 18, Pet. App. 32a. Only the United States and Italy have made unqualified declarations of assistance under article 18. Czechoslovakia, Cyprus and the United Kingdom have declared that compulsion will be applied in the case of States offering reciprocal assistance. *Martindale-Hubbell* at 15-21.

³⁵ The question of the effect of a refusal by a witness to give evidence voluntarily before a consul or commissioner was considered by the Special Commission which convened in advance of the full Conference to prepare an initial draft Convention. The Commission reached no decision on this issue. *Special Commission Report* at 72. During the Conference, the Danish delegation proposed that:

where no order of compulsion has been issued under article 16, refusal of a person to appear or to give evidence before the consul shall not render such person liable to any penalty or prejudice in relation to the proceedings for which the evidence is required. [*Convention History* at 149.]

The Danish proposal was rejected by a vote of thirteen to five with one abstention. *Id.* This vote was in essence ratification of the views of the Convention Rapporteur (Mr. Amram of the United States) who stated:

[T]he Danish proposal related to a question which was fundamentally a matter for the internal law of each Contracting State. It should be for that law to determine the effect which would be given to a failure by a witness to give evidence. The Convention should not attempt to regulate this question. The effect of the Danish proposal would be to impinge on the administration of justice within the forum where the lawsuit was pending. [*Id.* at 150.]

³⁶ For example, documents were produced and depositions taken utilizing a commissioner appointed under the Convention procedures in

The French Blocking Statute. Petitioners in the present case are corporations formed under the laws of the Republic of France. SNIAS is wholly-owned by the Government of France; SO-CATA is a subsidiary of SNIAS. Petitioners maintain no corporate offices, manufacturing plants or service facilities in the United States. All of petitioners' documents and business records relevant to the discovery sought here are located in France and thus are subject to the French Blocking Statute.³⁷

The French Blocking Statute prohibits the disclosure of "economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence [establishment of proof] with a view to foreign judicial or administrative proceedings or in connection therewith" unless such disclosure is made in accordance with international agreements binding on France. Pet. App. 47a. The statute contains no provision authorizing its waiver; violations are punishable by fines and/or imprisonment. As a consequence, petitioners, their officers and employees face criminal exposure should they cooperate in discovery which disregards the procedures of the Hague Evidence Convention.

The French Blocking Statute was adopted in order to assure that American discovery practices on French soil conform with the rules laid down by the conventions for judicial assistance in effect.³⁸ Notwithstanding the entry into force of the Hague

Bulkley v. Mel O'Reilly Helicopters, Ltd., et al., Civil No. C80-480T in the U.S. District Court for the District of Washington.

³⁷ Although this brief adopts the shorthand employed by the case law and refers to French Penal Code Law No. 80-538 as a "blocking statute", this term is a misnomer. As explained below, the French statute does not actually block the gathering of evidence for foreign proceedings but merely channels such activities through the Hague Evidence Convention and other judicial assistance treaties to which France is a party.

³⁸ National Assembly Report No. 1814, A Mayoud, Reporter for the Commission on Production and Exchanges, 36 (1980) (hereinafter cited as *Assembly Report*) ("assurer la conformité de ces investigations [de plaignants américains] sur le sol national avec les règles posées par les conventions d'entraide judiciaires en vigueur").

Evidence Convention between the United States and France, private American plaintiffs had persisted in conducting discovery in France directed against French nationals outside the sanctioned channels.³⁹ The French Blocking Statute gives France the judicial means to put to an end practices which the National Assembly regards as infringing on French sovereignty⁴⁰ and to protect French enterprises from abusive foreign discovery practices.⁴¹ The express reference to treaties or international agreements at the beginning of the statute was intended to relieve any fears of the other parties to the Hague Evidence Convention that the statute might interfere with the use of its procedures.⁴²

The Proceedings Below. The claims in this case arise from the crash of a light aircraft near New Virginia, Iowa, on August 19, 1980. In two actions consolidated in the United States District Court for the Southern District of Iowa, plaintiffs allege that the aircraft manufactured by petitioners was defective and seek damages for personal injuries on theories of negligence and products liability.

In April and June 1985, plaintiffs served on petitioners several requests for admissions, a request for production of documents, and a set of interrogatories.⁴³ These requests concerned various advertisements, manufacturing records and general test data. Joint Appendix ("J.A.") at A-21-38. In response to plaintiffs' discovery requests, petitioners sought a protective order to require

³⁹ *Assembly Report* at 33-34, 36.

⁴⁰ *Assembly Report* at 37 ("la France devait se doter de moyens juridiques propres à mettre un terme à des pratiques portant atteinte à sa souveraineté").

⁴¹ *Id.*

⁴² *Assembly Report* at 41.

⁴³ Earlier requests for documents were served in August 1983 and April 1984. Joint Appendix at A-19. Petitioners provided those documents available within the United States and advised respondents that documents located in France should be requested through the Convention procedures. Respondents did not pursue the matter further until their April 1985 requests.

that discovery abroad be conducted in accordance with the provisions of the Hague Evidence Convention. They informed the court that, to the extent they have documents or information responsive to these requests not already produced, this evidence is located in France and that its disclosure is prohibited by French law except in accordance with the Convention. J.A. at A-1. The motion for a protective order was denied. The magistrate explained that his decision was based on "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts." Pet. App. 24a. He also speculated that the French Blocking Statute is not strictly enforced in France. Pet. App. 25a.

SNIAS and SOCATA petitioned the court of appeals for a writ of mandamus to review the magistrate's order. Relying heavily on Fifth Circuit precedent, the court held that the Hague Evidence Convention does not apply to the discovery requests here in question. It stated:

Although a minority of courts have adopted the position advanced by the Petitioners, in our opinion the better rule, which has been adopted by the vast majority of courts, is that when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention. [782 F.2d at 124, Pet. App. 4a.]

The court also adopted the analysis of the Fifth Circuit that "preparatory acts" which occur in foreign nations are not evidence gathering activities subject to the Convention. 782 F.2d at 124, Pet. App. 5a. Acknowledging that its decision would severely restrict the Convention's scope, the court observed: "the Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign nonparties who are not subject to an American court's jurisdiction and compulsory powers." 782 F.2d at 125, Pet. App. 6a.

The court then turned its attention to the French Blocking Statute which, in light of its earlier ruling that the Convention

does not apply, the court treated as an independent ground for petitioners' objections to compliance with discovery orders. On the basis of *Société Internationale v. Rogers*, 357 U.S. 197 (1958), and its progeny, the court found that considerations of comity do not require any deference to the French Blocking Statute. 782 F.2d at 126, Pet. App. 10a.

SUMMARY OF ARGUMENT

The Hague Evidence Convention applies whenever a U.S. litigant seeks discovery of documentary evidence or information located in the territory of a foreign signator. Whether a U.S. court has in personam jurisdiction over the person or company to whom the discovery request is directed does not affect the Convention's applicability. Likewise, recasting a demand for inspection of files located abroad as a request for their production on American soil does not make it any the less extraterritorial in effect. U.S. obligations under the treaty cannot be circumvented through this geographic fiction. By ruling to the contrary, the decision below has relegated the Convention to disuse in all but the most unusual circumstances. Unless reversed, it will foster international conflict over evidence gathering in U.S. proceedings.

A basic purpose of the Convention is to reduce conflicts with the laws or clearly articulated policies of foreign nations over extraterritorial discovery demands by encouraging mutual judicial cooperation. Only through the Convention has the United States obtained the consent of civil law nations to evidence gathering within their borders. Its purpose is frustrated if adherence to the Convention's procedures becomes the exception instead of the rule.

Only if efforts to obtain relevant evidence through the Convention's procedures proves unsuccessful should use of domestic discovery rules be considered. Such an approach harmonizes the Convention with domestic rules without surrender of U.S. sovereignty or judicial power. In the present case, no efforts to use the Convention have been made because the court below mistakenly concluded that the Convention does not apply to the discovery requests here in question. Accordingly, its decision should be

reversed, and the case remanded to the trial court with instructions that the parties be required to adhere to the Convention's procedures.

Considerations of comity also require this result. Disclosure of the documents and information sought will violate the French Blocking Statute, as well as the judicial sovereignty of France, unless such disclosure is made through the procedures of the Convention. On the other hand, the procedures of the Convention can provide effective discovery in France. There is nothing in the record which indicates that use of the Convention would be fruitless or unduly burdensome. Accordingly, adherence to its procedures should be required.

ARGUMENT

I

THE HAGUE EVIDENCE CONVENTION APPLIES WHENEVER A U.S. LITIGANT SEEKS DISCOVERY OF EVIDENCE LOCATED IN THE TERRITORY OF ANOTHER SIGNATORY

In determining the applicability of the Hague Evidence Convention, the locus of the evidence and nature of the proceeding for which it is sought are the critical factors. Where, as here, evidence is sought for a judicial proceeding to decide a civil or commercial dispute and the evidence sought is located in the territory of another signatory to the Convention, the Convention applies. By holding to the contrary, the decision below has relegated the Convention to disuse in all but the most unusual cases.

A. The Convention Applies to Discovery Abroad Even From Persons Over Whom a Court Has Jurisdiction

The court below erred by holding that, because the court has personal jurisdiction over petitioners, the Hague Evidence Convention does not apply to the discovery of documents or information in their possession located within the territory of a foreign signatory. The Convention does not distinguish between parties and non-parties with regards to its applicability. Rather, the

history of the Convention indicates that it was intended to apply to parties as well as others, and the contracting States have so construed it.

The task of interpreting the Convention begins "with the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 105 S.Ct. 1338, 1341 (1985). The procedures for obtaining evidence described in the Convention do not distinguish between parties and non-parties. Article 3 states simply that a letter of request should specify, where appropriate, "the names and addresses of the *persons* to be examined" (emphasis supplied). Similarly, the procedures in Chapter II of the Convention speak of taking the evidence of "nationals" (arts. 15 & 16) and of a request to appear addressed to a "person" (art. 21).

The Convention's drafting history shows that the draftsmen intended its provisions to apply to parties and non-parties alike. In its memorandum proposing the Convention, the United States pointed to various provisions of Public Law 88-619, enacted in 1964, which significantly liberalized United States domestic law for providing assistance to foreign litigants and tribunals. The principles incorporated in Public Law 88-619 were delineated. No distinction was drawn between a party and non-party, only between a "willing" and "unwilling" party or witness. It was urged that "much could be gained if the members of the Conference could move towards . . . a relaxation of barriers against voluntary testimony by 'willing' parties or witnesses." *U.S. Memorandum* at 17 (emphasis supplied).⁴⁴

A vote on a Danish proposal during the Conference makes quite clear that the understanding of the U.S. delegation was shared by the other parties. The Danish delegate proposed replacing the word "witness" in what eventually became article 21(b) of the Convention with the word "person," in order to "clarify that [the article] applied to *all* witnesses requested to give evidence in a lawsuit, including the parties." *Convention History*

⁴⁴In responding to the pre-Conference questionnaire, the United States repeated its earlier statement urging as a goal of the Conference a "relaxation of barriers against voluntary testimony by a party or witness." *Convention History* at 28 (emphasis supplied).

at 148 (emphasis in original). The Conference President called the proposal completely justified ("tout à fait justifiée") and it was unanimously adopted. *Id.*

That the Convention was intended to apply to persons over whom a court has jurisdiction is also apparent from the parties' practical construction of it.⁴⁵ The governments of France, Germany and the United Kingdom have indicated that they regard the procedures of the Hague Evidence Convention as applicable in such circumstances. Each has filed an amicus brief with the Court so stating. The view of the United States is identical. In *Volkswagenwerk A.G. v. Falzon*, 464 U.S. 811 (1983), *appeal dismissed*, 465 U.S. 1014 (1984), the Solicitor General informed the Court that the Convention's "strictures apply regardless of the existence of personal jurisdiction."⁴⁶

The decision below appears to conclude that the assertion of extraterritorial jurisdiction, based upon "minimum contacts," relieves the court from the obligations of international judicial cooperation imposed by the Convention. It thereby confounds the issue of whether personal jurisdiction exists with the separate question of whether exercising the power to compel would be

⁴⁵"In ascertaining the meaning of a treaty [the Court] may look beyond its written words to . . . [the contracting parties'] own practical construction of it." *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933); see *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943).

⁴⁶In *Volkswagenwerk*, the Solicitor General explicitly rejected the rule, adopted by the Eighth Circuit here, that the Convention has no applicability where the court has jurisdiction over the foreign person against whom discovery is sought:

The fact that a state court has personal jurisdiction over a private party . . . does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of the parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction. [Brief of United States as Amicus Curiae at 7 n.3.]

appropriate.⁴⁷ Unless reversed, the decision below would make violation of the judicial sovereignty of the civil law nations the rule rather than the exception.

B. The Convention Cannot Be Circumvented Through Demands That Evidence Located Abroad Be Produced on U.S. Soil

As an additional or alternative ground for holding the Convention inapplicable to the discovery requests here in question, the decision below invents a geographic fiction based upon where discovery "takes place." It states that "matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention." 782 F.2d at 124, Pet. App. 5a, quoting *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 611 (5th Cir.), petition for cert. filed, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98). This distinction elevates form over substance. It has no basis in the language of the treaty, its history or its construction by the parties. Convention procedures are applicable to any discovery request that requires a person to take action on the territory of a foreign signator. The test is simply whether the discovery demand has extraterritorial effect and has been made in a judicial proceeding concerning a civil or commercial matter.

⁴⁷"The decision to assert in personam jurisdiction over a foreign defendant in a civil action does not, and should not, involve a detailed inquiry as to the reasonableness of subjecting that person's property, employees, and affiliates throughout the world to the compulsory power of the court. To assume that all the property, employees, and affiliates of a company are subject worldwide to the compulsory discovery orders of all the courts before which a company might be ordered to appear as a defendant in a civil action is, in the end, to require that the rationality of such a course of action be weighed in each case as part of the decision whether to exercise jurisdiction over the defendant at all. The eventual effect well could be to reduce the number of forums open to the plaintiff in the first instance." Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 740 (1983).

Convention procedures are intended to protect the sovereignty of the contracting States as well as to facilitate the production of evidence. One aspect of a nation's sovereignty is the power to regulate (and also protect) the activities of its own nationals, particularly on its own soil. Would the United States have no concern if a German court ordered production of a U.S. citizen's confidential disclosures to his American lawyer in San Francisco, so long as the production occurred in Frankfurt? Would U.S. concern over a French court's order for production of business secrets from a U.S. aircraft manufacturer in St. Louis disappear as soon as it was made clear that the production would occur in Paris? To say that making a foreign national bring documents or information to the United States removes the foreign sovereign's legitimate concerns is to make a mockery of the principles of consent, cooperation and reciprocity underlying the Convention.

The Convention itself contains no distinction between preparatory acts and discovery. In fact, it employs neither term. Rather it addresses any "taking of evidence." The other parties to the Convention have made quite clear that they reject the distinction relied upon by the court below and that it fails to consider their sovereign interests. France, Germany and the United Kingdom have each filed an amicus brief here so stating. Further, in the process of drafting the Hague Evidence Convention, many of the participating governments expressed the view that even the voluntary gathering of evidence within their territory infringed upon their judicial sovereignty if not done in cooperation with their judiciary.⁴⁸

⁴⁸The concern of the civil law nations for the protection of their judicial sovereignty in the evidence gathering process was clearly expressed in response to a questionnaire distributed prior to the drafting session. Among the questions asked was, "Is there in your State any legal provision or any official practice, based on concepts of sovereignty or public policy, preventing the taking of voluntary testimony for use in a foreign court without passing through the courts of your State?" *Convention History* at 10. France replied that its concept of sovereignty and public order required that no evidence be taken on French territory except by its judicial authorities. *Id.* at 33. The German Government

On the basis of concerns for sovereignty, similar to those underlying the Convention, a number of the United States' closest allies and trading partners, including the United Kingdom, Canada, the Netherlands and France, have enacted statutes designed to maintain control of evidence gathering within their borders.⁴⁹ These statutes recognize no distinction between preparatory acts and the physical production of evidence. Generally, where their prohibitions apply, they apply to both.⁵⁰ The legislative history of the French Blocking Statute makes very clear that the law was adopted in order to put an end to evidence gathering activities conducted in France by private parties for use in foreign proceed-

stated that the hearing of a witness in a judicial proceeding constitutes an act of sovereignty which may only be performed by a judge or other legally authorized agent and that the obligation to testify established by foreign law cannot be extended onto German territory because it emanates from a foreign sovereign power. *Id.* at 22. Similar sentiments were expressed by Belgium (*id.* at 26), Italy (*id.* at 35), Luxembourg (*id.* at 37), Switzerland (*id.* at 44), Turkey (*id.* at 45), and Norway (*id.* at 38). See also Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp. L. Q. 646, 647 (1969).

⁴⁹Protection of Trading Interests Act, 1980, 29 Eliz. 2, ch. 11 (United Kingdom); Foreign Extraterritorial Measures Act, 1984, 33 Eliz. 2, ch. 49 (Canada); Economic Competition Act of June 1956, as amended by the Act of 18 February 1971, the Act of 15 December 1971 and the Act of 29 June 1977 (Netherlands); French Blocking Statute, Pet. App. 47a-51a.

⁵⁰For example, a "request" for documents or information located in France "with a view to foreign judicial or administrative proceedings" violates the French Blocking Statute unless made through the Convention. Pet. App. 48a. Thus the "preparatory" acts of locating and assembling documents or information in France would fall squarely within the statute's prohibition. Similarly, the Canadian Foreign Extraterritorial Measures Act empowers the Canadian Attorney General to prohibit or restrict "[t]he doing of any act in Canada in relation to records" located in Canada that is likely to result in disclosures of such documents or the information they contain "for the purposes of a foreign tribunal." 33 Eliz. 2, ch. 49, § 3.

ings which were bypassing the Convention.⁵¹ Other countries have adopted blocking statutes because of similar concerns.⁵² Thus, not only is the distinction invented by the decision below (and the cases on which it relies) not found in the text of the Convention, but it condones invasion of precisely those interests which the Convention was designed to protect.

II

THE CONVENTION SHOULD BE USED FOR GATHERING EVIDENCE ABROAD

The Hague Evidence Convention represents a weighing and balancing of divergent sovereign interests. In order to avoid conflicts of law when a litigant seeks evidence located in one signatory for use in proceedings in another, the parties have each pledged to make available minimum procedures for obtaining evidence which may be supplemented bilaterally, or even unilaterally by the state executing the request. To serve this purpose, the Convention's procedures must be used before resort to domestic law is considered.

A. Treatment of the Convention As Merely Optional Frustrates its Basic Purpose

"The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them." *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928). The basic purpose of the Hague Evidence Convention is to foster

⁵¹*Assembly Report* at 36-37, see notes 38-42 and accompanying text, *supra*.

⁵²"A number of countries, in a reaction against what they conceive of as abuses inherent in some forms of pre-trial discovery combined with exorbitant assertions of judicial jurisdiction, have adopted . . . statutes which prohibit the production of certain evidence abroad or provide for the possibility that an order may be made prohibiting such production." *1985 Report on Convention Operation* at 1675.

mutual judicial cooperation in gathering evidence for civil or commercial matters; avoiding conflicts between contracting states over procedures for obtaining evidence is one of its central objectives. Only through the Convention have civil law nations given consent to U.S. evidence gathering activities within their borders. By ratifying the Convention, the United States has pledged itself both to mutual judicial assistance and to self-restraint in use of its own methods for gathering evidence abroad. The basic purpose of the Convention is frustrated, and reciprocity defeated, when U.S. courts treat the Convention's procedures as merely optional.

1. The Convention Is Intended to Accommodate Divergent Legal Systems

The history of the Hague Evidence Convention shows that it was adopted in large measure to avoid the friction created by the extraterritorial application of domestic discovery procedures. The task of its draftsmen was to harmonize the differing legal philosophies and concepts of sovereignty of the common law and civil law nations and "to locate a procedural device which would be acceptable to all the differing systems."⁵³ Indeed, the United States was the chief proponent of such a convention and obtained important concessions from the civil law nations on the basis that the Convention's procedures would be a substitute for the unsupervised extraterritorial use of federal discovery rules, which those nations regard as oppressive and an invasion on their sovereign rights.

From the standpoint of the civil law nations, the protection of their judicial sovereignty was an important consideration in fixing the terms of the Hague Evidence Convention. The report of the U.S. delegation which participated in the Convention's drafting notes this concern:

In drafting the Convention, the doctrine of "judicial sovereignty" had to be constantly borne in mind. Unlike the common-law practice, which places upon the parties to the

⁵³Special Commission Report at 56; see 1969 U.S. Hague Delegation Report at 806.

litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities.

The act of taking evidence in a common-law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil-law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized foreign person. It may violate the "judicial sovereignty" of the host country, unless its authorities participate or give their consent. [1969 U.S. Hague Delegation Report at 806.]

In the discussions which resulted in the Hague Evidence Convention, the civil law nations agreed to liberalize and simplify the process for obtaining evidence through their courts for use abroad as the quid pro quo for lessening foreign intrusions on their judicial sovereignty.⁵⁴

In contrast, the primary U.S. objective in the treaty negotiations was to minimize the difficulties in obtaining evidence from countries with different legal systems.⁵⁵ The United States recognized that "other countries for historic and other reasons have different legal procedures for affording assistance to litigants before foreign and international tribunals," but urged that "much could be gained" through movement towards the following objectives —

⁵⁴"[I]f the convention does not restrict unilateral extraterritorial discovery methods, then the civil law countries received no meaningful quid pro quo for their concessions to the United States under the convention. While there is no requirement of 'consideration' in international treaty law, unilateral concession is not the most probable explanation for the behavior of governments in international negotiations." Oxman, 37 U. Miami L. Rev. at 760-61.

⁵⁵Senate Foreign Relations Committee Report at 1; Convention History at 28.

1. A relaxation of barriers against voluntary testimony by "willing" parties or witnesses;
2. A willingness to permit, under court supervision, use of the techniques of examination of the foreign forum;
3. A resort to a more efficient and less expensive method of transmitting documents of international judicial assistance, and
4. An expansion of the categories of officers before whom testimony may be taken to include, for example, commissioners and consuls.⁵⁶

The Convention achieves these objectives.⁵⁷ It represents a compromise among the countervailing interests of the United States and the civil law nations intended to foster mutual judicial cooperation among the contracting States.⁵⁸ The heart of this compromise is to establish minimum standards and procedures for extraterritorial evidence gathering which are tolerable to the authorities of the state where the evidence is taken and of use in the forum where the action will be tried.⁵⁹

⁵⁶U.S. Memorandum at 17.

⁵⁷In evaluating the Convention, the U.S. delegation to the drafting stated:

The United States delegation considers that the Convention is a major contribution to the elimination of formal and technical obstacles to securing evidence abroad in a form that is usable in the requesting court. [1969 U.S. Hague Delegation Report at 820, reprinted in *Convention Transmittal* at X.]

⁵⁸Preamble, Hague Evidence Convention, Pet. App. 26a; *Convention Transmittal* at III ("This Convention is a significant step forward in the field of international judicial cooperation").

⁵⁹1969 U.S. Hague Delegation Report at 806; *Convention Explanatory Report* at 11; Amram, 67 Am. J. Int'l L. at 106.

2. Only Through the Convention Have Civil Law Nations Given Consent to Foreign Evidence Gathering Activities Within Their Borders

When a court attempts to exercise its power in the territory of another nation, basic principles of international law require that foreign nation's consent.⁶⁰ Conducting discovery abroad is the exercise of such power.⁶¹ While in some cases consent to the extraterritorial exercise of power might be implied, the Convention's history makes clear that this is not the case with regard to the conduct of discovery by foreign litigants in civil law nations.

France regards the Convention's procedures as the mandatory and exclusive means of obtaining evidence located on its soil for use in U.S. judicial proceedings concerning a civil or commercial matter.⁶² This follows directly from the civil law view that evidence gathering is an exercise of judicial sovereignty. "Some states [regard] the taking of evidence and similar acts as being essentially judicial and therefore solely within the jurisdiction of

⁶⁰Chief Justice Marshall authored the classic American formulation of this principle:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restrictions All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. [*The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).]

⁶¹"Under established principles of both domestic and international law . . . American courts are precluded from ordering anyone to participate in discovery proceedings in the territory of a foreign state absent that state's consent, wholly independent of the Evidence Convention." Brief for the United States as Amicus Curiae, *Club Mediterranee, S.A. v. Dorin*, 465 U.S. 1019 (1984), reprinted in 23 Int'l Legal Materials 1332, 1338 (1984). See also Restatement of U.S. Foreign Relations Law (Revised) vol. 1 at 386 (Tent. Draft No. 6, 1985).

⁶²Brief of Republic of France as Amicus Curiae. See also Pet. App. 52a-57a (diplomatic note from Republic of France).

their courts."⁶³ The doctrine of judicial sovereignty "gives to the judicial authorities of the State the *exclusive* control over the taking of evidence and forbids any outside person from taking evidence without the permission and control of the judicial authorities of the State."⁶⁴

Efforts to avoid "intrusions [on judicial sovereignty] and to provide an orderly system for foreign discovery" of evidence⁶⁵ resulted in the adoption of the Hague Evidence Convention. The United States proposed the drafting of an evidence convention in order to define "methods to satisfy doctrines of judicial sovereignty"⁶⁶ and thus obtain consent to U.S. evidence gathering abroad.⁶⁷

When the Convention's procedures are followed, the requisite consent is present. When they are not, the domestic law of France and other countries prohibits the taking of evidence for use in foreign judicial proceedings.

⁶³Convention History at 128.

⁶⁴Convention History at 63 (emphasis supplied). The question of the Convention's exclusivity was considered at the most recent meeting of the special commission on its operation. The report of the meeting notes that "certain States consider the taking of evidence in their territory to be a judicial act which, in the absence of permission, will violate their sovereignty, and consequently the operation of the Convention in their territory will take on an exclusive character." 1985 Report on Convention Operation at 1678.

⁶⁵Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60 (E.D. Pa. 1983).

⁶⁶Convention History at 55.

⁶⁷In proposing an evidence convention, the U.S. acknowledged that the federal rules of discovery could not authorize the use of extrajudicial techniques for the taking of evidence abroad "in countries that object to their use on the ground of judicial sovereignty." Convention History at 28-29. It was further stated that extrajudicial discovery procedures were used abroad only "when not offensive to the law of the State in which the examination is to take place." *Id.* at 31.

3. The Convention Is a Balancing of Sovereign Interests Ratified by the United States

The Hague Evidence Convention represents a balancing of sovereign interests intended to avoid conflicts between different legal systems. U.S. courts applying the principle of comity engage in a similar balancing. See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). This process of balancing sovereign interests is not, however, exclusively the province of the judiciary.⁶⁸ Each time the political branches conclude a treaty which creates rules of private international law, they engage in a process of balancing sovereign interests which affects the rights of U.S. and foreign citizens alike.

The United States and the other parties to the Hague Evidence Convention share a common interest in maintaining an effective transnational system of laws which facilitates the flow of commerce among nations.⁶⁹ This requires rules which provide private parties predictability in planning transactions and settling disputes.⁷⁰ It also requires restraint in enforcement of domestic law

⁶⁸See Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. Rev. 665, 727-30 (1986) (treaty law should be regarded as more authoritative than customary international law as source for rule of decision).

⁶⁹The Court has long recognized the paramount interest of the United States in maintaining a stable and reciprocally fair system for transnational interactions. "[International law] aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own." *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953). See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974) (uncertainty arising from refusal to enforce arbitration clause "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements"); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959) ("The controlling considerations are the interacting interests of the United States and of foreign countries . . .").

⁷⁰This Court has frequently recognized the importance of predictability in the international business setting as a factor in determining

abroad. "We cannot have trade and commerce in world markets and international waters exclusively on our own terms, governed by our laws, and resolved in our courts." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972).⁷¹

The judicial function concerns itself with the application of agreed principles; in their absence, the Court has been properly reluctant to render decisions which may lead to conflicts with the laws of other nations. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).⁷² On numerous occasions, the Court has refused to extend the jurisdiction of a federal statute to apply to foreign parties without a clear expression of intent from the political branches, where doing so would result in a conflict with foreign or customary international law.⁷³ In particular, the Court has declined to exercise U.S. jurisdiction in derogation of the provisions of a ratified treaty.⁷⁴

applicable U.S. law. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346 (1985); *Scherk*, 417 U.S. at 516-19; *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-15 (1972).

⁷¹See also *Mitsubishi*, 105 S.Ct. at 3355; *Scherk*, 417 U.S. at 519; *Sabbatino*, 376 U.S. at 433.

⁷²"It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or international justice." 376 U.S. at 428.

⁷³"For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important decision where the possibilities of international discord are so evident and retaliative action so certain. We, therefore, conclude that any such appeal should be directed to Congress rather than the courts." *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957). See also *Windward Shipping v. American Radio Association*, 415 U.S. 104 (1974); *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963).

⁷⁴See *Scherk*, 417 U.S. at 520-21 n.15 (1974) (enforcement of arbitration clause effectuated purpose of treaty.)

The Hague Evidence Convention represents a negotiated balancing of divergent sovereign interests designed to promote a smoothly functioning transnational commercial system. It provides mechanisms for taking evidence and consent to their employment. This accommodation of U.S. and foreign interests was actively encouraged by the United States and has been ratified by the political branches of the government. Courts derogate from the obligations of the treaty when they disregard its procedures or treat them as merely optional. See *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657-58 (1854).

B. Requiring First Use of the Convention Avoids Conflicts with Both U.S. and Foreign Law

In each instance where a U.S. court rules that adherence to the Convention's procedures is unnecessary to obtain documents or information located abroad, the court creates a conflict with foreign law which could otherwise have been avoided. Only by requiring use of the Convention, at least in the first instance, can courts give effect to the Convention's purpose and avoid most such conflicts. This does not require surrender of U.S. sovereignty or judicial power. Such a construction of the Convention harmonizes it with the federal rules and is consistent with the approach to foreign discovery taken by the new Restatement of Foreign Relations Law of the United States.

There is no inherent conflict between the Hague Evidence Convention and the federal discovery rules. Both are laws of the United States through which evidence can be sought. The federal rules contain provisions which contemplate the use of special procedures for discovery related to transnational litigation both in U.S. courts and abroad.⁷⁵ Use of the federal discovery rules,

⁷⁵Rule 28(b) specifically contemplates that U.S. litigants will use the methods authorized by the Convention to take evidence abroad — i.e., letters of requests and commissions — and allows the admission of such evidence in U.S. proceedings even though it may not conform to all formal requirements of U.S. law. Other provisions of the rules give courts the tools necessary to structure evidence gathering in accordance with the Convention and the practices of the other signatories. Rule 16 encourages the courts to control and actively manage the progress of

however, frequently runs afoul of foreign statutes, policies or procedures. "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States." Restatement of U.S. Foreign Relations Law (Revised) § 437, Reporter's note 1 (Tent. Draft No. 7, 1986).⁷⁶

A rule requiring first resort to the Convention where both the Convention and the federal rules apply gives effect to each. See *Watt v. Alaska*, 451 U.S. 259, 267 (1981).⁷⁷ Yet assuming arguendo that the Convention and the federal discovery rules are irreconcilably conflicting, under accepted principles of statutory and treaty construction, such conflicts must be resolved in favor of the Convention's use. First, the Convention is designed specifically to govern the taking of evidence in foreign nations, while the federal rules apply generally to all district court proceedings. "It is a well settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *Kepner v. United States*, 195 U.S. 100, 125 (1904).⁷⁸ Also,

cases before them, including discovery matters. The second paragraph of Rule 26(b)(1) authorizes the courts to limit the scope, amount or method of discovery. It was added to the federal rules in 1983 in an effort to curb abuses of the discovery process by discouraging redundant, overbroad and unnecessarily burdensome requests. Advisory Committee Notes on 1983 Amendment.

⁷⁶This tentative draft amends and supplements the prior tentative drafts. With these revisions, the tentative draft has now been adopted by the American Law Institute as Restatement (Revised). 54 U.S.L.W. 2593, 2595 (May 27, 1986).

⁷⁷"By the Constitution, a treaty is placed on the same footing, and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land and no superior efficacy is given to either over the other." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

⁷⁸See *Clifford MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944); *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932); *Harris v. Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D.

because the Convention was ratified after the federal rules were in effect, the Convention should prevail. *Watt v. Alaska*, 451 U.S. 259, 285 (1981) (Stewart, J., dissenting); *Cook v. United States*, 288 U.S. 102, 118-19 (1933).⁷⁹

Use of the Convention is consistent with the general approach to foreign discovery advocated by the new Restatement of Foreign Relations Law of the United States. The Restatement acknowledges the well-established principle that consent is required for the exercise of judicial power within the territory of a foreign sovereign and that extraterritorial discovery is in fact the exercise of such power.⁸⁰ Such consent is most clearly given through an international agreement which, under the doctrine of *pacta sunt servanda*, "is binding upon the parties to it and must be performed by them in good faith." Restatement of U.S. Foreign Relations Law (Revised) vol. 2 § 321 (Tent. Draft No. 6, 1985). In the absence of such agreement, the Restatement counsels judicial restraint.

The Restatement recognizes the friction which has been generated by American discovery abroad. To avoid such friction, it encourages courts to exercise greater control over extraterritorial discovery than they do in strictly local matters. In the absence of a specific treaty regulating discovery abroad, section 437(1) "contemplates that, in civil litigation in the United States affect-

775, 777-78 (M.D. La. 1984) (Hague Service Convention prevails over Fed. R. Civ. P. 4 because "aimed specifically at service of process made in foreign countries").

⁷⁹Although the federal rules have been amended since the Convention took effect, these amendments make no mention of the Convention and have no effect on the operation of its procedures. They do not provide a basis for concluding that the federal rules supersede the Convention. Such an implicit repeal of a treaty is strongly disfavored. See *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

⁸⁰"The underlying principal of international law reflected in this subchapter is that neither service of judicial documents nor taking of evidence in connection with litigation may be conducted without that state's consent express or implied." Restatement of U.S. Foreign Relations Law (Revised) vol. 1 at 386 (Tent. Draft No. 6, 1985).

ing foreign interests, courts control discovery practices from the outset of litigation pursuant to Rule 16 of the Federal Rules of Civil Procedure and comparable State rules." Restatement of U.S. Foreign Relations Law (Revised) § 437, comment a (Tent. Draft No. 7, 1986). The comments on section 437 emphasize that, as a matter of good practice, requests for discovery abroad should be made by the courts, not the litigants, and that the courts should scrutinize requests closely to curb excessive demands.

Before issuing an order for production of documents, objects or information located abroad, the court . . . should scrutinize a discovery request more closely than it would scrutinize comparable requests for information located in the United States Given the degree of difficulty in obtaining compliance, and the amount of resistance that has developed in foreign states to discovery demands originating in the United States, it is ordinarily reasonable to limit foreign discovery to information necessary to the action (typically, evidence not otherwise readily obtainable) and directly relevant and material. [*Id.*]

The Restatement notes that the second paragraph of Rule 26(b)(1) gives the federal courts the power to impose such limitations on discovery. *Id.*

Like the Hague Evidence Convention, section 437 of the Restatement is based upon a recognition that the exercise of jurisdiction extraterritorially must be tempered in order to avoid conflicts and to foster the interest of the United States in a smoothly functioning transnational commercial system. See Restatement of U.S. Foreign Relations Law (Revised) § 403 & comment a (Tent. Draft No. 7, 1986). In fact, section 437 directs that resort to international judicial assistance be considered before an order based on domestic rules is issued.⁸¹

⁸¹ § 437(1)(c) (court should consider "the availability of alternative means of securing the information"); see § 473 Reporter's note 6 (Tent. Draft No. 6, 1985). Section 473 recognizes the general principle of international law that "a state may determine the conditions for taking evidence in its territory in aid of litigation in another state," and

Requiring use of the Convention will not hamper unduly the power of U.S. courts. They will retain their power under the federal rules to compel discovery, to draw adverse inferences from failures to produce evidence, or to impose other sanctions. In determining whether such measures are appropriate and in fashioning an appropriate order, the court will have the benefit of a developed record with which to evaluate the relevant considerations, including, in the case of an unexecuted letter of request, a statement of objections from a foreign court. However, for the same reasons that first use of the Convention should be required, orders compelling discovery or imposing sanctions under the federal rules should not become routine in such cases. Rather, such orders should rest on express findings that (1) use of the Convention has been attempted, (2) directly relevant, necessary and material evidence exists which could not be obtained through the Convention's procedures, and (3) a balancing of relevant interests, including the sovereign interests of each nation involved as well as the long-term interests of the international system, supports such an order.

III

CONSIDERATIONS OF INTERNATIONAL COMITY ALSO SUPPORT USE OF THE CONVENTION

By giving effect to the Convention, which represents a weighing and balancing of sovereign interests, the Court can avoid the sensitive task of balancing such interests itself. Both the Convention and the federal rules are U.S. law which the courts are bound to administer. As we have shown, requiring use of the Convention, at least in the first instance, effectuates the Convention's purpose, and construes it in harmony with federal discovery rules. Thus, considerations of international comity, which concern the resolution of conflicts between U.S. and foreign law, need not be addressed here. However, such considerations also support the

describes generally the Hague Evidence Convention. Section 473 does not squarely address the precise issues presented by this case, and the comments indicate only that U.S. law in this area is unsettled. See comment b & Reporter's note 6.

conclusion that the Convention should be used in the first instance, both as a general rule and on the specific facts of this case.

The principle of international comity requires U.S. courts to avoid creating conflicts with foreign law when possible and to consider self-restraint as a means of resolving those conflicts which do arise. The decision below creates a direct conflict with French law that could be avoided through use of the Convention. The procedures of the Convention provide effective methods for obtaining documents and information located in France, and there is nothing in the record here to support a claim that their use would be futile or unduly burdensome.

A. Comity Considerations Caution Against the Unnecessary Creation of Conflicts With Foreign Law

U.S. courts apply the principle of comity to avoid conflicts and accommodate the important sovereign interests of other nations where such accommodation can be achieved consistent with the rights of its own citizens or others under the protection of its law. *Hilton v. Guyot*, 159 U.S. at 163-64. "'Comity,' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other." *Id.*⁸² The

⁸²In *Anschuetz*, the Solicitor General commended to the Court a "flexible" comity inquiry which "depends on the circumstances of each individual case." See Brief for the United States as Amicus Curiae, *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority*, petition for cert. filed, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98), and *Messerschmitt Bolkow Blohm, GmbH v. Walker*, order granting cert. vacated, 54 U.S.L.W. 3809 (U.S. June 9, 1986) (No. 85-99), at 12. This analysis is said to depend on "intractable factors" which make it "difficult for this Court to provide additional specific guidance to the lower courts." *Id.* at 20. This approach to comity may be adequate and appropriate for the Executive Branch in the conduct of U.S. foreign relations but generates no rules with which courts can reach principled decisions resolving justiciable controversies presenting conflicts between U.S. and foreign laws. What the Solicitor General has commended to the Court is a political concept of comity, concerned with maintaining amicable external relations, which as a legal principle amounts to no more than "mere courtesy and good will."

legal concept of comity is a principle of conflict of laws enabling courts to choose when and how far to apply domestic law and when and how far to recognize interests protected by foreign law.⁸³ Comity as a generator of choice-of-law principles has long been employed in the jurisprudence of this Court in formulating general rules to govern recurrent factual situations.⁸⁴

Application of comity as a choice of law principle in the present context results in a rule requiring first use of the Convention, both as a general matter and on the facts of this case. First, use of U.S. discovery procedures abroad often violates foreign law and is a source of international friction.⁸⁵ Here there is a direct conflict with the French Blocking Statute. Second, the United States and the other parties to the Convention, including France, share an interest in establishing an effective and predictable system of mutual judicial assistance which avoids such friction.⁸⁶ Third, the Convention provides an effective means to obtain evidence located in France as well as in other signatory nations.⁸⁷ Only where use of the Convention proves unsuccessful should courts consider the use of domestic discovery procedures.

The creation of a direct conflict with foreign law is a very important comity consideration favoring restraint in the extraterritorial application of domestic law. "American courts should

⁸³See Maier, *Extraterritorial Jurisdiction at a Crossroads*, 76 Am. J. Int'l L. 280, 283-84 (1982); J. Story, *Commentaries on the Conflict of Laws* 32-33 (Bigelow ed. 1883).

⁸⁴See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 105 S.Ct. at 3355-56 (comity requires enforcement of provisions in international agreements to arbitrate antitrust claims); *Lauritzen v. Larsen*, 345 U.S. at 577-78, 593 (Jones Act not applicable to injuries occurring on foreign flag vessel outside U.S. waters); *Canadian Southern Railway Co. v. Gebhard*, 109 U.S. 527, 539 (1883) (comity requires U.S. courts to recognize bankruptcy reorganization plans in foreign courts).

⁸⁵See discussion at notes 48-67 and accompanying text above.

⁸⁶See discussion at notes 68-74 and accompanying text above.

⁸⁷See discussion at notes 92-102 and accompanying text below.

refrain, whenever it is feasible, from ordering a person to engage in activities that would violate the laws of a foreign nation." *Compagnie Francaise D'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16, 28 (S.D.N.Y. 1984). "Ordinarily, a state may not enforce a regulation in circumstances that require a person to do something in another state prohibited by that state." Restatement of U.S. Foreign Relations Law (Revised) § 403, comment e (Tent. Draft No. 7, 1986). This is particularly so where, as here, the order is directed to a foreign national,⁸⁸ compliance with the order would result in criminal exposure,⁸⁹ and alternative methods are available to achieve the same end.⁹⁰

In the present case, disclosure of the documents and information sought will violate the French Blocking Statute, as well as the judicial sovereignty of France, *unless* such disclosure is made through the procedures of the Hague Evidence Convention. Under the French Blocking Statute, petitioners and their employees would be subject to criminal penalties for furnishing documents or information located in France in response to discovery

⁸⁸See *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 244-5, 186 Cal.Rptr. 876, 880-81 (1982). See also Restatement (Second) of Foreign Relations Law of the United States § 40, comment d (1962) and Restatement of U.S. Foreign Relations Law (Revised) § 403(2)(b) (Tent. Draft No. 7, 1986).

⁸⁹See *United States v. First National Bank of Chicago*, 699 F.2d 341, 345-6 (7th Cir. 1983); *In re Westinghouse Litigation*, 563 F.2d 992, 997 (10th Cir. 1977). See also Restatement (Second) of Foreign Relations Law of the United States § 40(b), comment c (1962) ("In determining whether to refrain from exercising jurisdiction, a state must give special weight to the nature of the penalty that may be imposed by the other state").

⁹⁰See *United States v. Vetco*, 691 F.2d 1281, 1290 (9th Cir.) cert. denied, 454 U.S. 1098 (1981); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 858, 176 Cal. Rptr. 874, 884-85 (1981) ("[I]f a channel more apt to elicit the cooperation of the foreign government is plainly available but is not used, then in our view insufficient account of the requirements of international comity had been taken . . ."). See also Restatement of U.S. Foreign Relations Law (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986).

requests made directly under the federal rules, and the statute contains no provision for its waiver. Further, the statute was expressly adopted to protect the judicial sovereignty of France by requiring adherence to the Convention's procedures in response to charges that they were being routinely circumvented, primarily by American plaintiffs.⁹¹ Thus, the French Blocking Statute expresses as clearly as possible the strong interest of France in regulating the gathering of evidence on its soil.

B. Effective Discovery Can Be Obtained Under the Convention

The procedures of the Convention can provide effective discovery within France. Through letters of request or proceedings before a consular official or private commissioner, respondents could obtain answers to written interrogatories, production of documents or depositions.⁹² Further, France has enacted legislation authorizing French courts to carry out letters of request in accordance with methods requested by foreign courts.⁹³ This means that evidence so gathered can be taken in a form utilizable in U.S. courts.⁹⁴

Respondents have made no attempt to employ the Convention's procedures.⁹⁵ The trial court should be instructed that only after such attempts have been made should any requests for further assistance be considered. The court would then be in a position to weigh comity considerations, including respondents' further needs, if any, on the basis of a developed record.

⁹¹See notes 38-42, *supra* and accompanying text.

⁹²See arts. 15-17, Pet. App. 31a-32a; Borel & Boyd, 13 Int'l Law at 41.

⁹³See note 17, *supra* and accompanying text.

⁹⁴Rule 28(b) also insures this result.

⁹⁵As several courts have noted, until a party makes proper application under the Convention for evidence located abroad, we cannot know what discovery can be obtained. See, e.g., *Gebr. Eickhoff Maschinfabrik und Eisengieberei v. Starcher*, 328 S.E.2d 492, 502 (W. Va. 1985); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686, 690 (1984).

Respondents have previously represented to the Court that they should not be required to make use of the Convention's procedures because such attempts would be futile.⁹⁶ These arguments are based upon a misunderstanding of the Convention as well as France's implementation of it.

Respondents have primarily based their claim that use of the Convention would be futile on France's declaration under article 23, reserving its right not to execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." The Court should not assume that countries which have exercised their right under article 23 will fail to cooperate in providing requested evidence contained in documents. To the contrary, the general intent of this reservation was only to prevent discovery of a "fishing" nature.⁹⁷ According to the Special Commission on the Convention's operation, "[r]efusal to execute turns out to be very infrequent in practice."⁹⁸ Moreover, the Convention narrowly circumscribes those situations in which the execution of a letter of request may be refused. Art. 12, Pet. App. at 30a. It also expressly contemplates good faith attempts by foreign courts to implement any legitimate discovery request. Art. 9, Pet. App. at 29a.⁹⁹

Although the Republic of France has reserved its rights pursuant to Article 23 of the Convention, this reservation does not apply to letters of request seeking the discovery of documents which are enumerated and have a direct and clear nexus with the subject matter of the litigation.¹⁰⁰ In matters similar to the present one, the French Ministry of Foreign Affairs has advised U.S.

⁹⁶Brief in Opposition to Petition for Certiorari at 12-14.

⁹⁷1978 Report of U.S. Delegation on Convention Operation at 1421.

⁹⁸1978 Report on Convention Operation at 1431.

⁹⁹See *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. at 61 (E.D. Pa. 1983); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d at 858, 176 Cal. Rptr. at 884-85.

¹⁰⁰See Letter from the Ministry of Justice to the Ministry of Foreign Affairs annexed to the Brief of the Republic of France as Amicus Curiae.

litigants to seek information or documents of a technical or commercial nature through the Convention's procedures.¹⁰¹

Additionally, respondents could obtain the information they seek by proceeding under Chapter II of the Convention and utilizing a consular official or private commissioner to take evidence. These methods can be utilized to obtain the production and inspection of documents as well as depositions or answers to written interrogatories. Where a party employs them, the question of whether a French court might refuse to execute a request never arises.

Although France (like most other parties to the Convention) has not declared that it will use compulsion to assist a consular official or commissioner authorized to take evidence under Chapter II, there is nothing in the present record to suggest that such compulsion would be necessary. Petitioners have cooperated with other U.S. litigants who have sought evidence using Chapter II methods and expect that they would cooperate here with any reasonable request to employ these procedures. Moreover, the Convention contemplates that courts of the requesting State determine on the basis of their own domestic law whether drawing adverse inferences or imposing sanctions against a party who refuses to cooperate in such voluntary procedures would be appropriate.¹⁰²

There is nothing of record showing that use of the Convention's procedures here would be fruitless or unduly burdensome. Neither the convenience of the local bar nor speculation that use of the Convention might result in delays is a sufficient reason in a comity analysis to decline enforcement of the treaty. Courts can expect to encounter such claims in every case where the Convention is involved. Thus, to rely on them alone would be to decide that comity considerations virtually never mandate the Convention's use.

¹⁰¹See, e.g., *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686 (1984).

¹⁰²See note 35, *supra* and accompanying text.

C. Lower Courts Need Clear Guidance On the Convention's Use Which the Principle of Comity Alone Does Not Provide

Assuming that comity considerations must be weighed in determining whether the Convention should be used, this weighing and balancing should be done primarily by the Court in the formulation of a general rule. Allowing lower courts to decide on a case-by-case basis whether to employ the Convention without clear rules for guidance makes the outcome of individual cases too uncertain and tends generally to relegate the Convention to disuse. This is the practical consequence of the generalized comity analysis which the Solicitor General has commended to the Court.

There are strong practical reasons why the principle of comity cannot serve as a substitute for a clear general rule concerning the Convention's use. Application of the principle of international comity concerns the "exercise of judicial self-restraint in furtherance of policy considerations which transcend individual lawsuits." *Volkswagenwerk A.G. v. Superior Court*, 123 Cal.App.3d at 857, 176 Cal.Rptr. at 884. Trial courts are not well suited to evaluating the full range of such policy considerations, and private litigants are often not well situated to prove them. For example, section 403 of the new Restatement includes a non-exhaustive list of eight factors relevant to such an analysis.¹⁰³ This list includes "the importance of the regulation in question to the international

¹⁰³Section 403(2) states:

Whether the exercise of jurisdiction is reasonable or unreasonable is judged by evaluating all the relevant factors, including, where appropriate,

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which

political, legal or economic system," and "the extent to which another state may have an interest in regulating the activity." While the Justice Department and foreign governments can assist the courts to some extent with questions such as these by filing briefs as *amicus curiae*, it cannot reasonably be expected that the courts will receive such assistance every time a question of the Convention's use or applicability arises.¹⁰⁴

Generally, foreign governments participate in U.S. legal proceedings as *amicus curiae* only where they expect the case to establish a rule of broad applicability. This is not a reasonable expectation in the overwhelming majority of discovery disputes which nonetheless affect material interests of foreign sovereigns, as well as interests of the international commercial system. Thus, leaving the lower courts to decide whether to require use of the Convention on a case-by-case basis presents a serious risk that these interests will be neglected.

In the absence of a clear rule requiring the Convention's use, a trial court is often swayed by the immediacy of the discovery

other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question;

(e) the importance of the regulation in question to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by other states.

¹⁰⁴Given the substantial burden and expense of participating in a case as *amicus curiae*, foreign governments cannot be expected to undertake such participation in U.S. litigation routinely. Moreover, even where a case touches on very important interests of a foreign sovereign, there is a substantial risk that the foreign government will not learn of the proceeding or discover the case's potential impact on its sovereignty in time to participate as *amicus*.

demands made by the litigant standing before it.¹⁰⁵ There is a tendency to dismiss countervailing considerations as merely abstract or hypothetical questions of sovereignty.¹⁰⁶ Moreover, because the question of whether to require adherence to Convention procedures generally arises in discovery, courts are often called upon to balance comity considerations on the basis of a scanty factual record. This is particularly true in cases arising before any attempt to utilize the Convention's procedures, since the courts can only speculate as to the possible results of the Convention's use, as well as any delay, expense or inconvenience that might be

¹⁰⁵One commentator has described the attitude of the lower courts as follows:

Committed to the value of the convenience of the plaintiff (particularly in tort actions), not to mention that of the local bar, a court asserts in personam jurisdiction on the basis of "minimum contacts," regardless of whether the defendant is from Rome, Italy or from Rome, Georgia. The court then orders depositions of the defendant's employees in Geneva, Switzerland as if they were in Geneva, New York and the inspection of documents or equipment located in Hanover, West Germany as if they were in Hanover, New Hampshire. The court normally faces the implications of what it is doing only when it comes up against a foreign criminal statute, and even then asserts the power to override foreign laws by ordering parties "before the court" to attempt in good faith to persuade foreign governments not to enforce their laws that interfere with United States discovery practices. [Oxman, 37 U.Miami L.Rev. at 741-42 (footnotes omitted).]

¹⁰⁶See, e.g., *Murnhy v. Reifenhauer K.G. Maschinenfabrik*, 101 F.R.D. 360, 363 (D. Vt. 1984); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 450 (S.D.N.Y. 1984).

involved.¹⁰⁷ The result is often findings that are conclusory and result-oriented.¹⁰⁸

There can be little appellate control of a case-by-case approach to comity because trial court rulings on discovery matters are reviewable before judgment only by extraordinary writ, and such review is by its nature difficult to obtain.¹⁰⁹ Clear guidance is needed in the present case to prevent the trial courts' institutional bias towards familiar domestic procedures from becoming de facto judicial abrogation of the treaty. See *Trans World Airways v. Franklin Mint Corp.*, 466 U.S. 743 (1984).

¹⁰⁷See *Work v. Bier*, 106 F.R.D. 45, 55 (D.D.C. 1985) (in which the court refused enforcement of the Convention, apparently relying solely on a law review article to conclude: "It is obvious that [the Convention's] procedure for the gathering of evidence . . . will be highly ineffectual . . ."); *Graco v. Kremlin Inc.*, 101 F.R.D. 503, 511 (N.D. Ill. 1984) ("On the record before the court, there is great uncertainty as to the scope of discovery that Graco may obtain through a Letter of Request to France").

¹⁰⁸See e.g., *Graco v. Kremlin, Inc.*, 101 F.R.D. at 521 ("discovery does not 'take place within [a state's] borders' merely because documents to be produced somewhere else are located there."); *Murphy v. Reifenhauer K.G. Maschinenfabrik*, 101 F.R.D. at 363 (comity "does not require plaintiff to proceed first under the Convention in this case, particularly at this relatively late stage of discovery, and particularly where it appears that a request for production of documents under the Convention would be futile"); *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227, 1229 (E.D. Pa. 1983) (denying protective order on finding that it was "not clear that compliance with the plaintiffs' discovery request [would] require a violation of German law or impinge upon the sovereignty of the Federal Republic of Germany").

¹⁰⁹*Boreri v. Fiat S.P.A.*, 763 F.2d 17, 20 (1st Cir. 1985) (refusing to address merits of mandamus petition raising question of interplay between Hague Evidence Convention and Federal Rules of Civil Procedure).

CONCLUSION

The Hague Evidence Convention is applicable to the discovery at issue in this case, and use of the Convention's procedures should be required. Accordingly, the judgment of the court of appeals should be vacated and the case remanded to the trial court with instructions mandating use of the Convention.

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October Term, 1986

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SOCIETE NATIONALE INDUSTRIELLE
AEROSPATIALE and SOCIETE DE CONSTRUCTION
D'AVIONS DE TOURISME,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA,

Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties In Interest)

— 0 —
On Writ of Certiorari To The United States
Court of Appeals For The Eighth Circuit

— 0 —
**BRIEF FOR RESPONDENT
AND REAL PARTIES IN INTEREST**
— 0 —

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QUESTIONS PRESENTED

1. Whether the Hague Convention is applicable to the discovery of documentary evidence and information located abroad from a foreign national over whom a United States court has personal jurisdiction.

2. Whether the Hague Convention supplants the application of the discovery provisions of the Federal Rules of Civil Procedure when discovery of documentary evidence and information located abroad is sought from a foreign national over whom a U.S. court has jurisdiction.

3. Whether international comity requires the application of the Hague Convention in this case.

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No. 85-1695

In The
Supreme Court of the United States
October Term, 1986

SOCIETE NATIONALE INDUSTRIELLE
AEROSPATIALE and SOCIETE DE CONSTRUCTION
D'AVIONS DE TOURISME,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA,
Respondent.
(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties In Interest)

On Writ of Certiorari To The United States
Court of Appeals For The Eighth Circuit

**BRIEF FOR RESPONDENT
AND REAL PARTIES IN INTEREST**

Respondent United States District Court for the Southern District of Iowa together with Dennis Jones and John and Rosa George, real parties in interest, respectfully submit this brief on the merits.

STATEMENT

The Petitioners are corporations owned by the Republic of France which design, manufacture and market aircraft. (Pet. App. 1a). Although they design and manu-

facture their aircraft in France, they advertise and sell them in the United States. (*Ibid*). On August 19, 1980, an aircraft sold by Petitioners crashed in New Virginia, Iowa. (*Ibid*). John George, a passenger, and Dennis Jones, pilot-in-command, were injured in the crash. As a result of this crash, Dennis Jones, John George, and Rosa George (collectively "Plaintiffs") instituted actions, founded in negligence, defective products liability and breach of warranty, for damages against the Petitioners. (*Ibid*). The actions were consolidated in the United States District Court for the Southern District of Iowa. (*Ibid*). Upon the parties' consent, the district court referred the actions to a magistrate in accordance with 28 U.S.C. § 636 (c)(1). (*Ibid*).

In August 1983, Plaintiffs served the Petitioners with an initial request for production of documents; this request sought the flight manual, pilot's handbook, performance data and testing records of the aircraft involved in the crash. (J.A. A19-A20). In December 1983, Petitioners furnished to Plaintiffs copies of the Type Certificate and type certificate data for the aircraft. (Pet. App. 12a). In May 1984, Petitioners supplied Plaintiffs with a copy of the flight manual. Plaintiffs served a second request for production in April 1984 seeking reports and design specifications for the aircraft. (J.A. A27-A29). A set of interrogatories and requests for admissions were served upon the Petitioners in April 1985, and a second set of requests for admissions in June 1985. (J.A. A21-A26; J.A. A30-A38). These requests for admissions and interrogatories were limited in scope to certain claims about the aircraft contained in advertisements published in United States aviation magazines.

Petitioners declined to comply with this second discovery request, and sought a protective order from the magistrate. (Pet. App. 12a; J.A. A1-A11). Petitioners contended that the responsive information and documents could properly be produced only through the procedures set forth by the Hague Evidence Convention.¹ Petitioners

¹ 23 U.S.T. 2555, TIAS No. 7444. The Hague Evidence Convention is also set forth in 28 U.S.C.A. § 1781 (1986 Supp.); VII Martindale-Hubbell Law Directory, Part VII, at 12-14 (1986); 1 B. Ristau, International Judicial Assistance (Civil and Commercial) at DS-50-DS-63 (1984); Pet. App. at 26a-41a.

"The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters provides three methods of obtaining evidence abroad: by a letter rogatory, requesting authorities and a signatory state to obtain evidence or to perform some other judicial act to obtain evidence; by notice to appear before an American consulate officer or foreign officer; or by designation of a private commissioner. The Hague Convention, 23 U.S.T. 2555, TIAS No. 7444. Under the letter rogatory method, the letter of request is transmitted to the central authority of the foreign state and must specify:

- (a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
- (b) the names and addresses of the parties to the proceedings and their representatives, if any;
- (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
- (d) the evidence to be obtained or other judicial act to be performed.

Other information as needed must also be specified, according to Article 3. 23 U.S.T. 2558-59. Letters of Request must be in the language of the authority requested to execute it or be accompanied by a translation into that language. Art. 4. France has made an authorization pursuant to

(Continued on following page)

also argued that production by means other than the Convention would violate a French "Blocking Statute" prohibiting the transmittal of evidence for use in foreign judicial proceedings except as provided by international agreement or French law. (J.A. A9-A10).²

(Continued from previous page)

Art. 33, providing that it will execute only letters in French, or accompanied by a translation in French. 28 U.S.C.A. §§ 1635-1960, 1984 pocket part, p. 90. Pet. App. 12a-13a.

The Convention was ratified by the United States in 1970 and entered into force in 1972. Ristau, *supra* at DS-101. The Convention was ratified and entered into force by France in 1974. Ristau, *supra* at DS-75. France also declared under Art. 23 of the Convention that Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known common-law countries, will not be executed. Ristau, *ibid*.

² Law No. 80-538, [1980] Journal Officiel 1799; (Law Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents or Information to Foreign Natural or Legal Persons). Ristau, *supra* Vol. 2 at CI-72; Pet. App. 47a-51a. The relevant portions of the French Blocking Statute provide as follows:

Article 1—*bis*—Subject to treaties or international agreements and laws and regulations in force, it is forbidden to all persons to ask, research or communicate, by writing, orally or under any other form, documents or information on economical, commercial, industrial, financial or technical matters leading to establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings.

* * *

Article 2—The persons affected by article 1 and 1A must inform, without delay, the Minister in charge whenever they are requested in any manner to provide such information.

* * *

(Continued on following page)

In addition to responding to the first request for production, Petitioner responded to the first and second sets of requests for admissions in October 1985. Petitioners participated, under the Federal Rules of Civil Procedure, in the deposition of Plaintiff John George. Petitioners also availed themselves of the Federal Rules of Civil Procedure in serving upon Plaintiffs two sets of interrogatories and a request for production. Plaintiffs answered the interrogatories and furnished the requested documents.

The district court denied Petitioners' Motion for Protective Order and ordered compliance with Plaintiffs' discovery requests. (Pet. App. 11a-25a). The Magistrate, after balancing the competing interests, based his decision primarily upon his "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts, and the potential interference with such proceedings which forced compliance with foreign court procedures would cause." (*Id.* at 24a). In response to Petitioners' claim that discovery would violate the French Blocking Statute, the Magistrate cited evidence that the provisions of the statute "have not been strictly enforced in France" and that "a party who is affected by the law, may seek a waiver of its provisions from the appropriate French minister". (*Id.* at 22a). The court also found that the discovery sought—produc-

(Continued from previous page)

Article 3—Without prejudice to heavier sanctions stipulated by the law, any infraction to the present law Articles 1 and 1A provisions will be punished with two months to six months imprisonment and with a 10,000 to 120,000 French francs fine or any one of these two penalties only. Pet. App. 7a-8a.

tion of documents, responses for requests for admissions, and answers to interrogatories—"does not have to take place in France" and that the requested discovery was "not greatly intrusive or abusive". (*Id.* at 24a & 25a). The court concluded that it was dealing "with a conflict between two essentially equal federal laws. To permit the Hague Evidence Convention to override the Federal Rules of Civil Procedure would frustrate the courts' interests, which particularly arise in products liability cases, in protecting United States citizens from harmful products and in compensating them for injuries arising from the use of such products." (*Id.* at 25a). The court then ordered discovery as follows:

1. Defendant shall answer the interrogatories propounded by Plaintiffs and respond to Plaintiffs' request for admissions and for production of documents on or before October 1, 1985.
2. If discovery depositions are to be undertaken, *the court will require compliance with the Hague Evidence Convention if such depositions are to be conducted in France*, based on the court's understanding of the current law. (*Ibid.*) (emphasis added).

Petitioners then sought review of the Magistrate's decision through a Petition to the Eighth Circuit Court of Appeals for a Writ of Mandamus. (*Id.* at 1-19). The Court of Appeals considered the Petition on the merits, and after doing so, denied the Petition for Writ of Mandamus. (*Id.* at 1a-10a). While recognizing that a minority of courts have adopted the position advanced by the Petitioners, it was the opinion of the Court of Appeals that:

the better rule, which has been adopted by the vast majority of courts, is that when the district court has jurisdiction over a foreign litigant, the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention. (*Id.* at 4a).

The Eighth Circuit specifically adopted the Fifth Circuit's view that:

matters preparatory to compliance with the discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention.

(*Id.* at 5a, quoting *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 611 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. July 17, 1985) (No. 85-98)). The court concluded that "[t]he discovery sought in this case neither intrudes on nor threatens French judicial sovereignty or custom." (*Ibid.*). The court found that:

the Magistrate's order did not require any foreign attorneys to appear in France to conduct discovery procedures that are typically considered a judicial function by France and other civil law countries. The order simply requires the Petitioners, who are parties subject to the jurisdiction of the United States court, to perform certain acts preparatory to the production of documents and information in the United States. These acts do not require any French judicial participation. (*Ibid.*).

The court then concluded that:

The Hague Convention does not apply to the discovery sought in this case "because the proceedings are in a United States court, involve only parties subject

to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad." *Messerschmitt Bolkow Blohm, GmbH*, 757 F.2d 729, 731 (5th Cir. 1985), [order granting cert. vacated, 106 S.Ct. 2887, 90 L.Ed.2d 975 (U.S., Jun 9, 1986) (No. 85-99)]. (*Ibid*).

In finding the Hague Convention to be justified by other consideration, the court further concluded that:

The Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign non-parties who are not subject to an American court's jurisdiction and compulsory powers. (*Id.* at 6a).

The Eighth Circuit Court of Appeals next considered Petitioners' contention that principles of international comity require that the Plaintiffs first attempt discovery through the Hague Convention procedures, and only if their discovery efforts prove futile, the Plaintiffs may then rely on the discovery procedures in the Federal Rules of Civil Procedure. The court agreed with the Fifth Circuit in *Ansuetz* that:

The greatest insult to a civil country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure. (*Id.* at 7a) (Citing *Ansuetz*, 754 F.2d at 613).

The court believed that such a policy would defeat rather than promote international comity. (*Ibid*).

The court next considered Petitioners' argument that they should not be required to comply with the Magistrate's discovery order, because to do so would subject them to potential criminal liability under the French Block-

ing Statute. After carefully reviewing the Magistrate's analysis of the competing national interests, relying on the factors set forth in the Restatement (Second) Foreign Relations Law of the United States § 40 (1965), the court concluded that the district court properly ordered the Petitioners to comply with Plaintiffs' discovery requests. (*Id.* at 9a). The court suggested that Petitioners, as corporations owned by the Republic of France, "stand in a most advantageous position to receive a waiver" of the Blocking Statute's requirements. (*Id.* at 10a). This issue would only be relevant should Petitioners fail to comply with the Magistrate's discovery order, and Plaintiffs sought to impose sanctions. (*Id.* at 9a-10a). No question of sanctions under Federal Rule of Civil Procedure 37 is before the Court at this time.

—o—

SUMMARY OF ARGUMENT

Discovery of relevant documents and information is critical in any case, but particularly so in a defective products liability case. Without just, speedy and inexpensive discovery, the courthouse is effectively barred to those who so desperately need it—United States citizens injured by defective foreign products. With these fundamental principles in mind, the Court of Appeals properly held that the Hague Convention procedures are not applicable to the limited discovery requested by Plaintiffs in this case.

The discovery sought by Plaintiffs in this case is limited to interrogatories, requests for production, and requests for admissions. This discovery will not take place

on French soil, nor will it infringe upon France's sovereignty. In such cases, the Hague Convention is inapplicable and not superior to the Federal Rules of Civil Procedure.

Well reasoned judicial authority, as well as a study of the language and history of the Hague Convention, find that the Hague Convention is not exclusive nor meant to supplant the Federal Rules of Civil Procedure for parties subject to *in personam* jurisdiction of American courts. The Hague Convention supplements the Federal Rules of Civil Procedure.

To require the Plaintiffs in this case to first resort to the Hague Convention procedure, will be a costly, burdensome and time-delaying exercise in futility. France's hostility towards American discovery practices is well known and clearly evidenced by its "Catch-22" maneuvers. It has decreed, under Article 23 of the Hague Convention, that it will not honor Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries. After adopting the Convention, France then unilaterally enacted a law that prohibits, under the threat of criminal penalty, French nationals from disclosing any information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith. The result is that injured Americans are effectively barred from obtaining meaningful discovery of French nationals who are parties before American courts. To argue that these Plaintiffs, if unsatisfied with any results under Hague convention procedures may ultimately resort to the Federal Rules of Civil Procedure, is specious. Addi-

tional proceedings before the court will be necessary, as well as probable further appeals with their attendant cost and delay—all to the prejudice of these Plaintiffs in this case, which is already some years old. The greatest insult to a civil law country's sovereignty would be for American courts to invoke a foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure.

The Petitioners have enjoyed all the benefits of marketing their products in the United States. They have taken advantage of the benefits of the Federal Rules of Civil Procedure in this litigation. To bar the Plaintiffs from these same benefits puts the Petitioners at an unfair and unjust advantage. The requested discovery does not infringe upon any vital French interests, nor its courts' sovereignty. Under the circumstances of this case, an abstract claim of "judicial sovereignty" cannot equate to a right—indeed, it would be an extraordinary privilege—to have all of the benefits of access to American markets, yet to be free from the burdens that American judicial procedures generally impose. Forced application of the Hague Convention procedures in this case defeats the vital United States' interest in assuring that all litigants proceeding before them are treated equally and fairly. Another vital national interest in this case is the protection of United States citizens from harmful foreign products and compensation for injuries caused by such products. Even under the principles of international comity, application of the Hague Convention is not warranted.

While not bound to apply a comity analysis to this case, the district court, in doing so, reached the proper

conclusion that the Hague Convention did not apply to Plaintiffs' requested discovery in this case. Accordingly, the order of the Court of Appeals should be affirmed.

ARGUMENT

I.

THE HAGUE EVIDENCE CONVENTION HAS NO APPLICATION TO THE LIMITED DISCOVERY SOUGHT IN THIS CASE

A. The Limited Discovery Sought by Plaintiffs Will Not "Take Place" Within France

The discovery sought by Plaintiffs is limited to answers to interrogatories, responses to requests for admissions, and production of documents. Plaintiffs have not requested the depositions of any French nationals, nor have Plaintiffs requested that they inspect any materials upon French soil.³

As its title implies, the Hague Evidence Convention governs the taking of evidence *abroad*.⁴ The Hague Convention has no application at all to the production of evidence in this country by a party subject to *in personam* jurisdiction of a district court pursuant to the Federal

³ Plaintiffs have no disagreement with the Magistrate's order that requires compliance with the Hague Evidence Convention if discovery depositions are to be conducted in France.

⁴ The title of the Convention itself states: "Convention on the Taking of Evidence Abroad in Civil or Commercial Matters". (emphasis added) Pet. App. 26a.

Rules of Civil Procedure. *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 615 (5th Cir. 1985).⁵ The discovery requested by Plaintiffs does not "take place" within France's borders merely because documents to be produced in the United States are located in France. Similarly, discovery should be considered as taking place here, not in France, when interrogatories or requests for admissions are served here, even if the necessary information is located in France. *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (N.D. Ill. 1984).⁶

⁵ See e.g. *Societe Nationale Industrielle Aerospatiale v. United States District Court for the District of Alaska*, 788 F.2d 1408, 1410 (9th Cir. 1986); *In re Messerschmitt Bolkow Blohm, GmbH*, 757 F.2d 729 (5th Cir. 1985); *Lowrance v. Michael Weinig, GmbH and Co.*, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985). It is noted that it has been held that the Hague Convention does not apply at all to the discovery of evidence available in the United States. *International Society of Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 443-44 (S.D.N.Y. 1984). No doubt some of the information and documents requested by Plaintiffs are located in the United States, at least with regard to the Petitioners' advertisements that appear in aviation magazines published in the United States. Although Petitioners claim (Pet. Br. p.13) that they maintain no corporate offices, manufacturing plants or service facilities in the United States, the fact is that they, or their American affiliates, are currently doing business and maintain offices in the United States. See *Aerospatiale* advertisement appearing in 113 *Flying* at pp. 62-63 (June 1986).

⁶ This proposition has been adopted by numerous courts including, *SNIAS*, 788 F.2d at 1410-11; *Messerschmitt*, 757 F.2d at 731; *Anschuetz*, 754 F.2d at 611; *Lowrance*, 107 F.R.D. at 389; *Work v. Bier*, 106 F.R.D. 45, 51-52 (D.D.C. 1985); *Krishna*, 105 F.R.D. at 448.

B. The Limited Discovery Sought by Plaintiffs Does Not Intrude Upon French Sovereignty

While the principles of international comity are not applicable to determine whether or not the Hague Convention should be applied to this discovery, the district court, in applying a comity analysis, correctly required Petitioners to answer the interrogatories propounded by Plaintiffs, and to respond to the request for admissions and production of documents under the Federal Rules of Civil Procedure. (Pet. App. 25a). The district court balanced France's interest in controlling its judicial system against the American interest in full pretrial discovery. The intrusion on French sovereignty is minimal, because no proceedings will place on French soil. *SNIAS*, 788 F.2d at 1411.⁷ Petitioners are required only to select the relevant documents in France. Such action is preparatory and does not require participation of the French government. *SNIAS*, 788 F.2d at 1411.⁸ The discovery requested by plaintiffs will not require American lawyers to conduct discovery in France, traditionally a judicial function in their system of jurisprudence.

The Hague Convention clearly does not govern Plaintiffs' limited discovery requests which do not require the "taking of evidence abroad". The principles of international comity do not apply to this discovery, but even if a comity analysis is used, the Convention procedures are not mandated.

⁷ Citing *Messerschmitt*, 757 F.2d at 732. See e.g. *Krishna*, 105 F.R.D. at 447; and *Graco*, 101 F.R.D. at 520-21.

⁸ Citing *Anschuetz*, 754 F.2d at 611.

II.

THE HAGUE EVIDENCE CONVENTION DOES NOT SUPPLANT THE APPLICATION OF THE DISCOVERY PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE TO FOREIGN NATIONALS SUBJECT TO IN PERSONAM JURISDICTION IN UNITED STATES COURTS

A. The Greater Weight of Reasoned Authority Holds the Hague Evidence Convention to be Non-Exclusive.

No federal court has found the provisions of the Hague Convention to be exclusive or mandatory. *SNIAS*, 788 F.2d at 1410.⁹ The United States supports the position that the Convention, based upon its language, history

⁹ Citing *Anschuetz*, 754 F.2d at 606, n.7; *Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 27 (S.D.N.Y. 1984). Some of the Courts finding that the Hague Convention is not to be the exclusive means of acquiring evidence from a foreign party are: *Lowrance*, 107 F.R.D. at 388; *Work*, 106 F.R.D. at 48 & 53; *Slauenwhite v. Bekum Maschinenfabriken, GmbH*, 104 F.R.D. 616, 618-19 (D. Mass. 1985). ("In sum, the treaty does not prohibit the taking of discovery in this country from foreign corporations over whom the Court has personal jurisdiction. Nor does it require an initial resort to the procedures of the Convention. This is perhaps no more than a corollary to the proposition that when a corporation 'purposely avails itself of the privilege of conducting activities with the forum State,' it has clear notice that it is subject to suit there. [citations omitted] Providing discovery is one of the aspects of being 'subject to suit' in this country"); *Krishna*, 105 F.R.D. at 446; *Compagnie*, 105 F.R.D. at 27; *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 48 (D.D.C. 1984); *Graco*, 101 F.R.D. at 517; *Murphy v. Reifenhauer K.G. Maschinenfabrik*, 101 F.R.D. 360, 361 (D. Vt. 1984); *Philadelphia Gear Corp. v. American Plauter Corp.*, 100 F.R.D. 58, 61 (E.D. Pa. 1983); *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) 17,222, 17,223 (1983).

and purposes, is not intended to prescribe the exclusive means by which American plaintiffs might obtain foreign evidence.¹⁰ The government of the United Kingdom, a Hague Convention signatory, agrees with the Court below that the Hague Convention does not provide the exclusive and mandatory means for obtaining documents and information located in another signatory state.¹¹ Even Petitioners recognize that the United States courts retain their power under the Federal Rules to compel discovery, to draw adverse inferences from their failure to produce evidence, or to impose other sanctions. (Pet. Br. 35; Pet. Reply Br. 5).

B. The Language and Negotiating History of the Hague Evidence Convention Indicates that it is Not the Exclusive Method for Obtaining Discovery Abroad.

The Convention text does not state that it is the exclusive means for obtaining discovery abroad. There is no express language in any way indicating that the Convention "must" or "shall" be employed to obtain all evidence in a signatory forum country. More importantly, it does not even intimate that it will supplant the internal laws or procedures of a forum state, like the United States, when the forum state has jurisdiction over the party who had control of the evidence located abroad.

The preamble to the Convention states that its purpose is to "facilitate" the transmission and execution of

¹⁰ Brief of Solicitor General as amicus curiae at 9.

¹¹ Brief of the government of United Kingdom of Great Britain and Northern Ireland as amicus curiae at 4 & 5.

Letters of Request and to "improve mutual judicial cooperation in civil or commercial matters". (Pet. App. 26a). The preamble does not state that one must use Convention procedures to obtain evidence located abroad. Similarly, Article I specifically states that "In civil or commercial matters a judicial authority of a Contracting State *may*, in accordance with the provisions of the law of that State, request the competent authority of another Contracting States by means of a Letter of Request, to obtain evidence, or to perform some other judicial act." (emphasis added). (Pet. App. 26a). Unlike the Hague Service Convention,¹² which expressly provides that it is exclusive, the Hague Evidence Convention contains no express provision for exclusivity. *Anschuetz*, 754 F.2d at 615, n.30. In fact, alternative methods ostensibly are preserved by Article 27 of the Convention, which states: "The provisions of the present Convention shall not prevent a Contracting State from . . . (c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." (Pet. App. 35a).¹³

The history of the United States' adoption of the Convention further confirms the permissive, supplemental nature of the Hague Convention. The Convention was drafted to expand and liberalize the previously available avenues for discovery, not to constrict them or limit the

¹² Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, reprinted in VII Martindale-Hubbell Law Directory, Part VII p. 1 (1986).

¹³ See *Anschuetz*, 754 F.2d at 608; *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227, 1228 (E.D. Pa. 1983); *Krishna*, 105 F.R.D. at 448; and *Graco*, 101 F.R.D. at 521-22.

jurisdiction of the courts of the signatory states. *Krishna*, 105 F.R.D. at 445.¹⁴ Phillip W. Amram, member of the United States delegation to the Convention and the rapporteur of the Convention makes it clear that the Convention:

“ . . . makes no major changes in United States procedure and requires no major changes in United States legislation or rules. On the other front, it will give the United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants.”¹⁵

Indeed, the delegation to the Convention emphasized that the Convention would require no significant change in United States rules and procedures. *1969 U.S. Delegation Report* at 820.

In interpreting the language of the treaty itself and its history, it is clear that it was never intended to apply exclusively to the discovery sought by Plaintiffs in this case.

¹⁴ See *Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law*, reprinted in 8 Int'l Legal Materials, 785, 807-15 (1969); Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651, 652-54 (1969). Even today, the question of exclusivity remains an issue with the experts representing the States which are now parties to the Convention. *Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 24 Int'l Legal Materials 1668, 1676 n.3 (1985).

¹⁵ Amram, 55 A.B.A.J. at 655.

C. The Federal Rules of Civil Procedure Are Not Supplanted By the Hague Evidence Convention.

The Federal Rules and the Hague Convention are essentially on equal footing. Both are entitled to be recognized as part of the supreme law of the land. *Anschuetz*, 754 F.2d at 608 n. 12; *Laker Airways*, 103 F.R.D. at 49.

The Convention was not intended to shield foreign litigants from the normal burdens of litigation in American courts. If the Hague Convention supplanted the Federal Rules of Civil Procedure, foreign litigants would have an extraordinary advantage in American courts. *SNIAS*, 788 F.2d at 1411.¹⁶ Petitioners' contention that such a conclusion will undermine the Hague Convention's stated purpose and render the entire Convention meaningless is not well founded. The Hague Evidence Convention and the Federal Rules of Civil Procedure, applicable to parties over which a federal court has *in personam* jurisdiction, may be both construed so as to avoid conflict and to be compatible with each other. The Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign non-parties who are not subject to an American court's juris-

¹⁶ “Whether the Convention was intended to limit intrusive unauthorized discovery proceedings by prohibiting them, or merely by offering an attractive alternative, the Court cannot agree that the Convention was intended to protect foreign parties, over whom an American court properly has jurisdiction, from the normal range of pre-trial discovery available under the Federal Rules of Civil Procedure.” *Graco*, 101 F.R.D. at 521. *Graco* has been cited by numerous courts, including: *Messerschmitt*, 757 F.2d at 731, n.5; *Anschuetz*, 754 F.2d at 611; *Lowrance*, 107 F.R.D. at 388; *Work*, 106 F.R.D. 45 at 50; *Krishna*, 105 F.R.D. at 448; *Slauenwhite*, 104 F.R.D. at 618.

diction and compulsory powers. (Pet. App. 6a); *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 125 (8th Cir. 1986) cert. granted 54 U.S.L.W. 3809 (U.S. June 9, 1986).¹⁷ Were the Convention viewed as the exclusive procedure for foreign discovery of foreign parties, these parties would be given an unfair evidentiary advantage over their American opponents. The foreign party would have full discovery of his opponent under the Federal Rules of Civil Procedure, while the American litigant would be forced to rely upon the limited Hague Convention procedures. Should the foreign government prove unwilling to carry out discovery requests under the Convention, the American litigant would be unable to prepare its case against the fully prepared foreign party. *Messerschmitt*, 757 F.2d at 731.¹⁸ It seems inconceivable

¹⁷ Citing *Graco*, 101 F.R.D. at 520. The Convention would apply to depositions of non-party witnesses willing to be deposed at home, but unwilling to travel to the country in which the litigation is proceeding. It also would apply where an unwilling non-party witness simply cannot be reached, if outside the court's jurisdiction, unless authorities' and the witnesses' state use their authority to compel the giving of evidence. See e.g. *Work*, 106 F.R.D. at 48; *McLaughlin v. Fellows Gear Shaper Company*, 102 F.R.D. 956, 958 (E.D. Penn. 1984).

¹⁸ The *Anschuetz* court stated that:

"*Anschuetz*' interpretation of the treaty, taken to its logical conclusion, would give foreign litigants an extraordinary advantage in United States courts. Insofar as *Anschuetz* seeks discovery, it would be permitted the full range of free discovery provided by the Federal Rules. But when a United States adversary sought discovery, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention. Further, we believe that requiring domestic litigants to resort to the Hague Convention to compel discovery against their foreign adversaries encourages the concealment of information—a

(Continued on following page)

that the United States intended this result in ratifying the treaty. In fact, Philip Amram, a member of the United States delegation to the 1968 Session of the Convention, stated that the Convention would affect "[n]o major changes in United States procedure and requires no major changes in United States legislation or rules." Amram, 55 A.B.A.J. at 655.

Traditionally, United States courts have had the power to require that a party or witness, over whom they have jurisdiction, comply with a discovery request. *Compagnie*, 105 F.R.D. at 27 (citations omitted). Extraterritorial discovery has been standard for some time, and there is no evidence that the United States, in agreeing to comply with the Hague Convention, intended to abandon this practice. *Id.* at 28.¹⁹ Since American courts have the power to require a foreign party subject to its *in personam* jurisdiction to respond to legitimate discovery requests under the Federal Rules of Civil Procedure, the Hague Convention cannot be construed to be the exclusive means for obtaining discovery from a foreign party.

(Continued from previous page)

result directly antithetical to the expressed goals of the Federal Rules and the Hague Convention which aimed to encourage the flow of information among adversaries."

754 F.2d at 606. See e.g. *Lowrance*, 107 F.R.D. at 387; *Krishna*, 105 F.R.D. at 446; *Compagnie*, 105 F.R.D. at 28; and *Adidas (Canada) Ltd. v. S.S. Seatrain Bennington*, No. 80 Civ. 1922, Slip Op. at 6 (S.D.N.Y. May 30, 1984).

¹⁹ See e.g. *Anschuetz*, 754 F.2d at 613; *Work*, 106 F.R.D. at 52; *Krishna*, 105 F.R.D. at 438; and *Laker Airways*, 103 F.R.D. at 48.

D. Petitioners Have Recognized that the Hague Evidence Convention is Not Exclusive.

The Petitioners themselves have suggested that the Hague Convention is not exclusive.²⁰ Early in the discovery process of this case, Petitioners' counsel indicated to Plaintiffs' counsel that the Convention could be waived.²¹ Petitioners further recognized the non-exclusivity of the Hague Convention in complying with some of Plaintiffs' discovery requests made under the Federal Rules of Civil Procedure.²² France also recognized that the Convention procedures were not exclusive when it enacted its "Blocking Statute."²³

²⁰ "No one denies the jurisdiction of the district court to order petitioners, at parties to the action before it, to give discovery of evidence in France." Pet. Reply Brief, p. 5. " * * * Conventions' procedures must be used before resort to domestic laws considered". Pet. Brief, p. 23.

²¹ Petitioners' counsel, in a letter dated October 18, 1983 to Plaintiffs' counsel, suggested that Plaintiffs' counsel indicate whether he preferred to proceed under the Hague Convention, or would accept Petitioners' good-faith efforts to comply with Plaintiffs' discovery requests on an informal basis. It was indicated that if Plaintiffs preferred the informal route, Petitioners' counsel would contact his client to recommend that the Convention be waived, but did note, that he did not have authority to waive the Convention, but merely stated that he would recommend to his client that it do so.

²² In December 1983, Petitioners furnished to Plaintiffs copies of the Type Certificate and type certificate data for the aircraft. No reference was made to the Hague Convention at this time. In May 1984, Petitioners supplied a copy of the flight manual. In October 1985, long after filing their Motion for Protective Order, Petitioners responded to Plaintiffs' request for admissions and further indicated that they would be supplemented.

²³ *Graco*, 101 F.R.D. at 519; Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, 586 n.4, 596-98 (1981).

The discovery sought by Plaintiffs is not governed by the Hague Convention in that such discovery will take place in the United States, not France. The Hague Convention is not exclusive, does not supplant the Federal Rules of Civil Procedure, and its application is not mandatory nor necessary in this case.

III.

APPLICATION OF THE PRINCIPLES OF INTERNATIONAL COMITY DO NOT REQUIRE THE HAGUE CONVENTION TO BE THE AVENUE OF FIRST CHOICE IN THIS CASE

A. A Comity Analysis is Unnecessary.

It has been held that no analysis of international comity need be made when all discovery sought is to occur in this country. *Lowrance*, 107 F.R.D. at 389.²⁴ Where the American federal district court has *in personam* jurisdiction over a foreign national, corporate entity or individual, it is not required to mandate that the parties follow the Hague Evidence Convention procedures for pre-trial discovery, nor is it required to exercise judicial restraint and defer to international comity where the utilization of the Hague Evidence Convention procedures would lead to an inordinate delay. *Work*, 106 F.R.D. at 55-56.

²⁴ As in this case, the *Lowrance* case concerned request for production of documents and interrogatories.

B. Comity, As Applied in this Case, Is the Weighing of France's Interest in Maintaining Control Over Its Judicial System Against the American Interest in Obtaining Full Pre-Trial Discovery.

It is recognized by Plaintiffs that most courts have stated that a district court should consider, as a matter of international comity, whether the parties should be required to proceed under the Hague Convention before discovery is compelled under the Federal Rules of Civil Procedure.²⁵ Comity in this case is the weighing of France's interest in maintaining control over its judicial system against the American interest in obtaining full pre-trial discovery of information relevant to pending litigation in the United States.

"Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

Hilton v. Guyot, 159 U.S. 113, 164-65, 16 S.Ct. 139, 143, 40 L. Ed. 95 (1895).

Petitioners argue that international comity is promoted and the judicial sovereignty of France preserved if the discovery orders against them are voided and Plaintiffs forced to establish their case under French internal

²⁵ See e.g. *SNIAS*, 788 F.2d at 1411; *Messerschmitt*, 757 F.2d at 731; *Anschuetz*, 754 F.2d at 614.

law and procedure via the Hague Convention. In support of their argument, Petitioners have cited the following cases: *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D. Pa. 1983); *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App 3d 840, 176 Cal. Rptr. 874 (1981); and *Pierburg GmbH v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982). These cases require litigants to rely on the Hague Convention as a first resort, reasoning that international comity is promoted thereby. These cases find that the purpose of the Hague Convention was to establish a uniform system for taking of evidence abroad, and that the sovereignty of the nation in whose borders the evidence exists is *per se* violated by deviation from the procedures outlined in the Convention. These courts conclude that litigants are free to return to the U.S. Court for further discovery orders should their first resort in the foreign tribunal prove unsuccessful.

However, the better reasoned jurisprudence addressing the Convention has found that the Convention was not designed to be the exclusive method for taking evidence abroad. There is nothing in the Convention indicating an intent to restrict the jurisdictional power of the federal district courts to enforce the discovery provisions of the Federal Rules of Civil Procedure with regard to all parties, including foreign parties, before the Court. The proper approach, and the one supported by the treaty's United States history, is to interpret the treaty to supplement, rather than to supplant the Federal Rules of Civil Procedure. First resort to the Convention, even under a comity analysis, is not necessary in every case.

C. The Application of the Factors Set Forth in Restatement (Second) of Foreign Relations Law § 40, Do Not Mandate the Application of the Hague Evidence Convention to the Limited Discovery Sought in this Case.

Some courts (including the one below), in balancing the competing interests, have applied the factors set forth in the Restatement (Second) of Foreign Relations Law § 40.²⁶ That section provides:

"Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as:

- (a) vital national interests of each of the states,
- (b) The extent and the nature of the hardship that inconsistent enforcement action would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.'²⁷

²⁶ Pet. App. 9a; *United States v. First National Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); *United States v. Vetco Inc.*, 691 F.2d 1281, 1288 (9th Cir. 1981); *Compagnie*, 105 F.R.D. at 29.

²⁷ *Ibid.*

1) Vital National Interests

France has no vital interests involved in this litigation. While France may have some argument if judicial acts were required to take place on its soil, such is not the case here. Plaintiffs' discovery requests do not require any proceedings to take place in France. Under the Federal Rules of Civil Procedure, discovery of documents located in France need not directly involve French judicial officers. No adverse party will enter on French soil to gather evidence. No oath need be administered on French soil or by a French judicial authority. What is required of Petitioners on French soil, is certain acts preparatory to the giving of evidence. They must select the relevant documents which they wish to reveal to Plaintiffs in the forum state. These acts do not call for French judicial participation.²⁸

On the other hand, the United States has several important interests in this litigation favoring enforcement of the district court's discovery order. The United States courts have an interest in assuring that all litigants proceeding before them are treated equally and fairly. This country has a clear interest in facilitating the manner in which foreign citizens doing business in the United States are available for litigation here. *Murphy*, 101 F.R.D. at 363. If a United States national is forced to resort to the Hague Convention rather than the federal discovery rules as to foreign national litigants, the foreign

²⁸ See e.g. *Messerschmitt*, 757 F.2d at 732; *Anschuetz*, 754 F.2d at 611; *Krishna*, 105 F.R.D. at 449; *Slauenwhite*, 104 F.R.D. at 618; *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984); *Adidas, Slip Op.* at 5.

national will have an unfair advantage. "If interpreted as preempting routine interrogatories and document requests, the Convention would really be much more than an agreement on taking evidence abroad, which it purports to be. Instead, the Convention would amount to a major regulation of the overall conduct of the litigation between nationals of different signatory states, raising a significant possibility of very serious interference with the jurisdiction of the court in which the litigation has begun." *Graco*, 101 F.R.D. at 521-22. The interpretation advocated by Petitioners would give an extraordinary and unfair advantage to French litigants before United States courts. "Insofar as the French litigant sought discovery of its United States adversary, it would be permitted the full range of free discovery provided by the Federal Rules. But when the United States adversary sought reciprocal disclosure by the French party, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention." *Adidas*, Slip Op. p. 6.²⁹

The United States has an important interest in discouraging parties before its courts from attempting to avoid compliance with its court's discovery orders. Requiring domestic litigants to resort to the Hague Convention to compel discovery against their foreign adversaries encourages the concealment of information—a result directly antithetical to the express goals of the Federal Rules and the Hague Convention, which aims to encourage the flow of information among adversaries. *Anschuetz*, 754 F.2d at 606.

²⁹ See also *Anschuetz*, 754 F.2d at 606.

The United States has a crucial interest in discouraging delay tactics undertaken by litigants within the jurisdiction of its courts. Requiring a party to seek discovery pursuant to the Hague Convention, particularly where the foreign party is a national of a country like France which has instituted a blatant policy of discouraging and hindering attempts to obtain pre-trial discovery within its borders, will result in nothing but useless delay. *Anschuetz*, 754 F.2d at 612. *Pain v. United Technologies Corp.*, 637 F.2d 775, 788-89 (D.C. Cir. 1980).³⁰

The United States also has a significant interest in protecting its citizens from harmful products and in compensating its citizens from injuries arising from the use of such products. (Pet. App. 23a).

The national interests of France and the United States balance heavily in favor of permitting the district court to exercise its jurisdiction to compel discovery in the United States in this matter.

³⁰ The Hague Convention machinery is quite slow and costly, even when the foreign government agrees to cooperate. *Krishna*, 105 F.R.D. at 450; *Murphy*, 101 F.R.D. at 361. The United States government, through the Securities and Exchange Commission, has first hand experience under the Convention in seeking to secure documents and testimony from third-party witness residing in France. Slow and costly indeed. Brief for United States and S.E.C. as amicus curiae, at 16. There is no reason to believe that French nationals will cooperate in United States pre-trial discovery. See Toms, *French Response to the Extra-territorial Application of the United States Antitrust Laws*, 15 Int'l Law. 585 (1981); National Assembly Report No. 1814, A. Mayoud, Reporter for the Commission on Production and Exchanges (1980).

2) Hardship

The requested discovery does not have to take place in France, and the procedures ordered by the district court are not greatly intrusive or abusive, nor do they infringe upon French sovereignty. Petitioners claim that the use of United States discovery procedures violates the "French Blocking Statute" and, therefore, creates a direct conflict with foreign law raising a very important comity consideration favoring restraint in the extra-territorial application of domestic law. (Pet. Brief, p. 37). This blocking statute (aptly named) obviously is a manifestation of French displeasure with American pre-trial discovery procedures, which are significantly broader than the procedures accepted in other countries. *Graco*, 101 F.R.D. 508; Toms, 15 Int'l Law. at 586. In the Solicitor General's view, objections founded merely on hostility to American law should be approached with some skepticism in any proper comity analysis. (Solicitor General's Amicus Curiae Brief pp. 24-25). The fact that the foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information, does not automatically bar a domestic court from compelling production. *Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 112, 78 S.Ct. 1087, 1095, 40 L.Ed. 95 (1958).³¹ The party relying on foreign law has the burden of showing that such law bars production. *Vetco*, 691 F.2d at 1289.

³¹ See e.g. *First National Bank*, 699 F.2d at 345; *Vetco*, 691 F.2d at 1281; *Krishna*, 105 F.R.D. at 447; *Compagnie*, 105 F.R.D. at 29; *Graco*, 101 F.R.D. at 509; and *Soletanche and Rodio, Inc. v. Brown and Lambrecht Earth Movers, Inc.*, 99 F.R.D. 269 (N.D. Ill. 1983).

It appears that the Petitioners could request a waiver from the appropriate Minister, and if the waiver were granted, provide Plaintiffs with the necessary information without fear of punishment. *Soletanche*, 99 F.R.D. at 271. Being nationalized French companies, there is no one in a better position to request and have granted such a waiver. This does not impose too great a burden upon Petitioners. In any event, it appears that the French Blocking Statute has not been strictly enforced. Toms, 15 Int'l Law. at 599 & 605.

On the other hand, the hardship imposed upon Plaintiffs, if subjected to mandatory use of the Hague Convention, will be extreme. At a minimum, Plaintiffs will be required to resort unnecessarily to the cumbersome and time-consuming procedures set forth by the French under the Hague Convention to obtain minimal information. More likely, in light of the French policy against pre-trial discovery, through its adoption of Article 23, Plaintiffs will be required to go through this expensive and time-consuming procedure only to come up empty handed, with a need to ultimately resort to Federal Rules discovery anyway, with possible requests for sanctions and probable appeals—all causing further delay. It has been recognized that serious problems have arisen as a result of the co-existence of blocking statutes and Article 23 reservations. Indeed, the combined effect of a blocking statute and a general, unrestricted reservation under Article 23, may paralyze the Convention and has caused the courts in the United States to not use the Convention. *1985 Special Commission Report* at 1677. The Special Commission also concluded that the adoption of an unqualified reservation, as permitted by Article 23, would

seem to be excessive and detrimental to the proper operation of the Convention. *Id.* at 1678. It also concluded that the combined effect of a blocking statute and an unqualified reservation under Article 23, when both are adopted by a state, may be to discourage the use by other states of the Hague Convention. *Id.* at 1679. Although the delegates to the June 1978 Special Commission meeting on the operation of the Convention agreed to urge the governments to reconsider their declarations under Article 23 of the Convention, France has not done so. *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 17 Int'l Legal Materials 1417, 1424 (1978). It appears unlikely that France will soon withdraw or limit its reservation prohibiting pre-trial letters of request. Toms, 15 Int'l Law. at 597. See also *National Assembly Report No. 1814*. Foreign litigants bear the burden of demonstrating that such reservations, such as France's declaration under Article 23, do not mean what they say. A foreign nation's insistence on retention of an absolute reservation under Article 23 necessarily raises serious questions about the likely effectiveness of discovery requests directed to it under the Convention. Solicitor General's Brief, pp. 27 & 28. Should this Court impose mandatory application of the Convention upon Plaintiffs, the hardship will fall on Plaintiffs, not Petitioners, and the administration of justice will be frustrated rather than added, as Plaintiffs would be unable to prepare their case against the fully prepared Petitioners.

Of course, in the event that Plaintiffs' efforts under the Hague Convention prove futile, and there is no reason to believe they won't be futile, further resort may be sought from the district court under the Federal Rules of Civil Procedure. As a proper party doing business in this jurisdiction, and the Court having *in personam* jurisdiction, Petitioners remain subject to any discovery orders that might be issued from the district court. *Philadelphia Gear*, 100 F.R.D. at 61. The greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure. *Anschuetz*, 754 F.2d at 613.³² The framers of the Convention could not have had such a result in mind.

3) The extent to which the required conduct is to take place in the territory of the other state.

The district court's order does not require any governmental action in France, any appearance in France of foreign attorneys, or any proceedings in France. It requires only that a party, admittedly subject to the personal jurisdiction of a United States court, produce documents, and to respond to request for admissions and answers to interrogatories in the United States. *Messerschmitt*, 757 F.2d at 732. Such minimal actions are not judicial acts requiring assistance of the Hague Convention.

³² See also *Graco*, 101 F.R.D. at 523.

4) Nationality.

Petitioners are French nationalized companies.

5) Enforcement and compliance.

This portion of the Restatement § 40 balancing test asks whether a competing regulatory scheme actually regulates the conduct in question, or whether it merely is on the books or is otherwise ineffective. In the context of the present dispute, the court must inquire whether France actually enforces the Blocking Statute. This inquiry is relevant not only to determine whether the Blocking Statute actually regulates conduct, but also to assess the likelihood that Petitioners will be punished for violating the Blocking Statute. *Graco*, 101 F.R.D. 513 & 514. As stated previously, it appears that the Blocking Statute has not been strictly enforced in France, may be waived, and Petitioners are in a favorable position to obtain a waiver.³³

In analyzing the balancing test, other courts also have recognized that the importance of the requested discovery should be considered. *Graco*, 101 F.R.D. at 515. See *Vetco*, 691 F.2d at 1290. There can be no question that discovery is an important aspect to any products liability case such as this one. Obtaining discovery directly from manufacturers is often crucial to the successful prosecution of a defective product case.

Even if international comity factors are called into play in this case, they do not justify requiring Plaintiffs to proceed pursuant to the Hague Convention to obtain

³³ Toms, 15 Int'l Law. at 599 & 605.

discovery from a party over whom the district court has personal jurisdiction. Petitioners purposely availed themselves of the privileges of conducting business within the United States. The aircraft which Petitioners manufactured was advertised in the United States in American aviation publications, sold in the United States, and presumably Petitioners profited from such activity. Petitioners obtained a Type Certificate from the Federal Aviation Administration so that the aircraft could be deemed airworthy in the United States. Petitioners are now, in fact, "Plaintiffs" in this litigation.³⁴ Petitioners have indeed made use of the Federal Rules of Civil Procedure to obtain discovery from Plaintiffs. Petitioners have propounded interrogatories to Plaintiffs, have participated in the deposition of Plaintiff John George, have requested and received various documents, and have had their expert examine some of the aircraft wreckage which is currently stored in Plaintiffs' counsels' office. To allow the Petitioners the full use and benefits of the Federal Rules of Civil Procedure, and at the same time restrict Plaintiffs to an exercise in futility under the Hague Convention, under which France has explicitly declared that it will not execute Letters of Request with regard to American pre-trial discovery, is unjust. Under the circumstances of this case, an abstract claim of "judicial sovereignty" cannot equate to a right—indeed, it would be an extraordinary privilege—to have all of the benefits of the access to American markets, yet to be free from the burdens that American judicial procedures generally impose.

³⁴ Petitioners filed their cross-claim on August 2, 1985, against the owner of the aircraft and the two pilots.

CONCLUSION

The Hague Evidence Convention is not applicable to the discovery at issue in this case, as the discovery will "take place" in the United States, not France. The French Blocking Statute does not require this Court to consider a comity analysis to determine if the Hague Convention should be applied. Even if this Court were to apply a comity analysis to the facts of this case, it should conclude that Plaintiffs' discovery is governed by the Federal Rules of Civil Procedure and not the Hague Convention. Accordingly, the judgment of the Court of Appeals should be upheld.

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(1)
No. 85-1695

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE AND
SOCIÉTÉ DE CONSTRUCTION D'AVIONS DE TOURISME,
Petitioners,

VS.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN and ROSA GEORGE,
Real Parties In Interest)

**On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit**

REPLY BRIEF

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**On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit**

REPLY BRIEF

The common thread running through all presentations of the issues in this case is the reluctance and unwillingness of many lower courts to give effect to the Hague Evidence Convention. When a U.S. court rules that adherence to the Convention's procedures is unnecessary to obtain documents or information located abroad, the court creates a conflict with foreign law which

could otherwise have been avoided. The Convention's procedures can be circumvented through an unstructured, result-oriented comity analysis, just as its strictures can be avoided through a finding that the Convention does not apply based on the court's jurisdictional power over a foreign party. Lower courts have done both. The challenge which this case presents is how to formulate a rule of general applicability which gives effect to the intent of the treaty's signators without unduly hampering the power of U.S. courts.

The specific task before the Court is to harmonize the Hague Evidence Convention with federal discovery rules. Both the Convention and the federal discovery rules are U.S. law. An analysis which asks whether a court should "defer" to the Convention under the principle of international comity is misguided; such an analysis treats the Convention as if it were foreign law. Jurisprudence applying the principle of international comity is relevant to the issues before the Court primarily because the Court has had extensive experience in its application, and a proper analysis of comity considerations provides additional support for a first-use rule. The issue before the Court, however, is how to give effect to the Convention, *not* how to define the principle of comity or whether its application requires discretion.

Respondents attempt in several ways to divert the Court from the task of harmonizing the Convention with the federal rules. They incorrectly state the central issue in this case as whether the Convention "supplants" federal discovery rules. The purpose of this legerdemain is to paint the question before the Court as an all-or-nothing choice: either the Convention is exclusive or, as respondents would have the Court conclude, it is a purely optional method of discovery. Respondents also claim that the Convention has no applicability to the discovery here in issue; hence the question of how to harmonize the federal rules with the Convention never arises for respondents. Finally, they offer a speculative and conclusory comity analysis which, as a practical matter, would almost never require use of the Convention where discovery under the federal rules is possible.

Respondents' arguments that the Convention's procedures are burdensome or are not an effective means to obtain evidence from

a foreign litigant are based on speculation rather than on anything of record. The government of France, appearing as *amicus curiae*, has explained fully how the Convention can be used efficiently and effectively to obtain evidence located in France, and petitioners have pledged themselves to cooperate in its use. Thus, resort to the Convention should be required here, both on the facts of this case and as implementation of a general rule designed to effectuate the intent of the Convention.

I

A RULE OF GENERAL APPLICABILITY IS MUCH NEEDED

There is considerable confusion among the lower courts about when the procedures of the Hague Evidence Convention should be used to gather evidence abroad. Some courts have ruled that the Hague Evidence Convention is the exclusive means for obtaining evidence located abroad.¹ Other courts have approached the question through a balancing of comity considerations but have reached different results in situations which do not appear readily distinguishable from one another.² Yet other courts, like the court below, have attempted to avoid the hard questions inherent in the case-by-case comity approach by holding that the Convention is not applicable when a court orders a

¹ See, e.g., *Rockwell Int'l Corp. v. Costruzione Aeronautiche Giovanni Agusta, S.P.A.*, No. 81-3984 (E.D. Pa. May 17, 1983) (order reversing order of Mar. 21, 1983); *Cannon v. Arburg Maschinenfabrik*, No. 80 L 2275 (Ill. Cir. Ct. July 21, 1983); *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention).

² "Understandably, if the concept of international comity lies somewhere between 'absolute obligation,' on the one hand, and 'mere courtesy and good will' on the other, as the United States Supreme Court suggested in *Hilton v. Guyot*, 159 U.S. at 163-64, 16 S.Ct. at 143, 40 L.Ed. at 108, different conclusions may be reached under substantially similar sets of circumstances." *Gebr. Eickhoff Maschinfabrik und Eisengieberei GmbH v. Starcher*, 328 S.E. 2d 492, 505 (W.Va. 1985) (reviewing conflicting decisions).

corporation over whom it has jurisdiction to produce evidence in the United States "even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention." 782 F.2d at 124, Pet. App. at 4a.³

Directing the lower courts to decide whether to make use of the Convention through a case-by-case analysis of domestic and foreign interests will not lessen this confusion. An ad hoc comity approach generates no rules to guide the lower courts. Moreover, clear rules cannot be expected to emerge from appellate supervision of a case-by-case approach. The question of whether to make use of the Convention typically arises in discovery. Rulings on such matters are reviewable before judgment only by extraordinary writ, and such review is by its nature difficult to obtain.⁴

There are significant practical difficulties for the lower courts in performing a case-by-case analysis of domestic and foreign interests. Because the question of whether to require adherence to Convention procedures generally arises in discovery, courts are often called upon to balance comity considerations on the basis of a scanty factual record, especially where no use of the Convention has been attempted. Not surprisingly, many trial court findings are conclusory and result-oriented.⁵

Inconsistent results and continuing uncertainty for litigants are the practical consequences of a case-by-case approach. As one trial court recently observed, "international civil litigants might benefit from the formulation of standards more reproducible in their application than the necessarily fact-laden comity inquiry."

³ See, e.g., *In re Anschuetz & Co. GmbH*, 754 F.2d 602, 611 (5th Cir. 1985), petition for cert. filed, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98); *Lowrance v. Michael Weinig, GmbH & Co.*, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (N.D. Ill. 1984).

⁴ See *Boreri v. Fiat S.P.A.*, 763 F.2d 17, 20 (1st Cir. 1985) (refusing to address merits of mandamus petition raising question of interplay between Hague Evidence Convention and Federal Rules of Civil Procedure).

⁵ See Brief for Petitioners at 43-45.

S&S Screw Machine Co. v. Cosa Corp., No. 2-85-0036, slip op. at 39 (M.D. Tenn. Oct. 17, 1986). A rule requiring use of the Convention in the first instance would implement the treaty's intent and would produce consistent results in the lower courts.

II

A RULE REQUIRING FIRST USE OF THE CONVENTION WOULD HARMONIZE IT WITH FEDERAL DISCOVERY RULES

The central issue before the Court is how to harmonize the Hague Evidence Convention with federal discovery rules. By focusing exclusively on a comity analysis which treats the Convention as if it were foreign law, the Solicitor General has failed to address this issue. A first-use rule effectuates the Convention's intent and is supported by a proper analysis of comity considerations which, unlike the analyses proffered by the Solicitor General and respondents, does not denigrate the significance of foreign sovereign interests.

A. By Focusing Exclusively on Comity, the Solicitor General Fails to Address the Central Issue in This Case

The issue before the Court is what legal obligations were created by U.S. ratification of the Convention and how to effectuate the treaty's intent. The Convention represents a balancing of sovereign interests intended to avoid conflicts between different legal systems. Like the Convention, the principle of comity seeks to accommodate foreign interests, insofar as that is consistent with U.S. interests, by tempering the exercise of sovereign powers. Because of the similarities between the concerns underlying the Convention and those expressed by the principle of comity, it is a relevant or useful concept in establishing a general rule concerning the Convention's use.⁶ The issue before the Court,

⁶ The Court has applied this principle in many contexts to formulate general rules. See Brief for Petitioners at 37 & n.84; Brief for Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH as Amicus Curiae in Support of Petitioners at 16-18. In the landmark case of

however, is not how to define the "American concept of international comity" or whether it "favors an individualized, case-by-case weighing of domestic and foreign interests,"⁷ but rather how to give effect to the Convention.

The Solicitor General addresses use of the Convention as if the United States were not a party to it. Hence the Solicitor General is silent on how to harmonize the Convention with the federal rules. Instead, it contends that a U.S. court needs to consider use of the Convention only when "it encounters objections to domestic discovery from a foreign signatory"⁸ and that, in those cases, the court should decide whether to honor such objections on the basis of an "individualized comity analysis" in which the foreign nation must show "specific and concrete interests that merit accommodation from United States courts."⁹ Thus, what the Solicitor General proposes is effectively a presumption of disuse, which foreign nations and foreign litigants would bear the burden of rebutting.

This viewpoint fails to give effect to the treaty's intent and treats its procedures as if they were foreign law. By ratifying the Convention, the United States has pledged itself both to mutual judicial assistance through Convention procedures and to self-restraint in use of its own methods for gathering evidence abroad.

The history of the Convention shows that it was adopted in large measure to avoid the friction created by the extraterritorial

Hilton v. Guyot, 159 U.S. 113, 163-66 (1895), the Court utilized the principle of comity to establish a rule that judgments of competent foreign courts having jurisdiction over parties will be enforced in the United States absent a showing of either fraud in obtaining the judgment or a violation of public policy. This general rule has now been formulated as a uniform statute adopted by some 16 states. See Uniform Foreign Money-Judgments Recognition Act §§ 3-4, 13 U.L.A. 265, 268 (1986).

⁷ Brief for the United States and Securities and Exchange Commission as Amici Curiae at 12.

⁸ *Id.* at 11.

⁹ *Id.* at 25.

application of domestic discovery procedures. In negotiation of the treaty, the United States obtained important concessions from the civil law nations on the basis that the Convention's procedures would be a substitute for the unsupervised extraterritorial use of federal discovery rules which those nations regard as oppressive and invasive of their sovereign rights. See Brief for Petitioners at 23-28.¹⁰ In light of this history, the Court should adopt a rule favoring the Convention's use and placing the burden of proving futility on those who would conduct discovery under domestic rules without ever attempting to obtain evidence under the Convention. Requiring instead that foreign nations and foreign litigants demonstrate a "specific and concrete" interest in the use of Convention procedures on the individual facts of each case would fail to effectuate the treaty's intent and would relegate the treaty to disuse.

B. A First-Use Rule Effectuates the Convention's Intent

Where, as here, a U.S. court rules that adherence to Convention procedures is unnecessary to obtain documents or information located in France, the court creates a conflict with foreign law which could otherwise have been avoided. The Convention was designed to prevent such conflicts. A rule requiring use of the Convention in the first instance accommodates foreign sovereign interests without surrendering U.S. judicial power. Respondents' arguments to the contrary misread the Convention's history, improperly construe article 27 of the Convention, treat the Con-

¹⁰ Even courts which have refused to apply the Convention recognize the accuracy of this statement of the treaty's intent. Thus, in *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. at 519-520, the court stated:

It cannot be denied that foreign displeasure with American discovery procedures played some part in shaping the Convention, . . .

....

It is fair to assume that the availability of the Convention procedures was intended to discourage, and possibly to preempt, the taking of evidence within a signatory state's borders without securing local judicial approval or cooperation whether the evidence is to be taken from a party or a non-party witness.

vention as if it were not U.S. law, and confuse jurisdictional power with the propriety of its exercise.

1. Respondents Misread the Convention's Ratification History

In arguing against any rule requiring the Convention's use, respondents place great reliance on a statement by a member of the U.S. delegation that the Convention "makes no major changes in United States procedure and requires no major changes in United States legislation or rules." Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A. J. 651, 655 (1969).¹¹ This reliance is misplaced. In context, this statement meant only that no U.S. legislation was required to implement the Convention because legislation and rules already in effect would do so.

Amram's central point is that the Convention preserves all more favorable and less restrictive practices for gathering evidence available under the domestic law of the nation in which the evidence is located or under other applicable treaties. He discusses in some detail the 1964 amendments to Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781-82 which "offer to foreign countries and litigants, without the requirement of reciprocity, wide judicial assistance on a unilateral basis for the obtaining of evidence in the United States." 55 A.B.A. J. at 651. Amram assures the reader that "the liberal and open practice in the United States under 28 U.S.C. § 1782, Section 3.02 of the Uniform Interstate and International Procedure Act and the law in most of the fifty states will remain unchanged." *Id.* at 652 n.8.

Respondents' interpretation of Amram's words as a promise that ratification of the Convention, and thus its adoption as U.S. law, would create no obligations for U.S. litigants or U.S. courts is strained and improbable. The United States had already provided

¹¹ The Solicitor General likewise relies upon this statement to support its assertion that the Convention's ratification history does not support a first-use rule. Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 14.

foreign litigants seeking evidence in the United States more liberal and less restrictive practices than those of the Convention. If the Convention creates no obligations on U.S. courts to make use of its procedures, then the treaty amounts to nothing more than unilateral concessions by the civil law nations.¹² Significantly, each of the foreign signatories which has appeared before the Court insists that the Convention creates an obligation to make use of its procedures, at least in the first instance, where the use of domestic procedures would run afoul of the law of another contracting nation.¹³

2. Respondents Improperly Construe Article 27 of the Convention

Article 27 is the provision of the Convention which, in Amram's words, "[p]reserve[s] all more favorable and less restrictive practices." 55 A.B.A. J. at 652. It states, inter alia, that the Convention "shall not prevent" a signator from "permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." Pet. App. 35a.¹⁴ Respondents erroneously contend that article 27 preserves alternative methods of the requesting state for gathering evidence abroad. The negotiation and ratification history of article 27 shows, however, that it was intended only to permit the nation where

¹² This is a highly improbable explanation for the negotiating behavior of foreign governments. See Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 760-61 (1983).

¹³ See Brief of Amicus Curiae the Republic of France in Support of Petitioners at 8-9 (the Convention "sets forth mandatory procedures by which evidence located abroad may alone be sought, unless the foreign sovereign permits otherwise"); Brief of the Federal Republic of Germany as Amicus Curiae at 13-17; Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners at 8.

¹⁴ Additionally, articles 28 and 32 permit bilateral or multilateral agreements among the Contracting States on matters covered by the Convention.

evidence is being sought to supplement the Convention through domestic procedures.

The explanatory report prepared after the Convention was completed and signed describes article 27 as "designed to preserve existing internal law and practice in a Contracting State which provides broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants." *Conférence de La Haye de Droit International Privé, IV Actes et Documents de la Onzième Session, Obtention des Preuves à l'Étranger* 215 (Bureau Permanent de la Conférence ed. 1970). The discussion which follows makes clear that article 27 authorizes the use of alternative methods for gathering evidence but only "if the internal law or practice of the *State of execution* so permits." *Id.* (emphasis supplied). These statements are echoed in the report which accompanied the Convention's transmittal to Congress. *See* S. Exec. A, 92d Cong., 2d Sess. 39-40 (1972) (identical statements).

The Convention was intended to improve mutual judicial cooperation and to avoid conflicts among contracting states over evidence gathering activities within another state's borders. Respondents' reading of article 27 defeats this purpose. "[V]iewed in light of the underlying policies [article 27] permits only the country in which the evidence is being sought to supplement unilaterally the convention procedures with its internal rules." *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983).

3. Respondents Treat the Convention as if It Were Not U.S. Law and Confuse Judicial Power With the Propriety of Its Exercise

Respondents argue at length that the Convention is not the mandatory and exclusive means through which evidence located in a foreign signator can be obtained for use in U.S. litigation. Respondents would have the Court conclude that, if the Convention is not exclusive, U.S. litigants are free to disregard it. This false dichotomy treats the Convention as if it were not U.S. law. It also fails to distinguish between the existence of judicial power and the extent to which its exercise is appropriate. A rule of first use does not divest U.S. courts of judicial power but rather

implements a treaty obligation of the United States by requiring closer judicial supervision of discovery directed at evidence located in the territory of a foreign signator.

The Hague Evidence Convention, like the Federal Rules of Civil Procedure, is a law of the United States which the courts are required to interpret and administer. The federal rules contain provisions which contemplate the use of special procedures for discovery related to transnational litigation both in U.S. courts and abroad,¹⁵ and the Convention establishes such procedures. The issue before the Court is how to harmonize the Convention with the federal rules, not, as respondents state, whether the Convention "supplants" the federal rules. A rule requiring first resort to the Convention where both apply gives effect to each. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981).

A first-use rule does not divest U.S. courts of jurisdiction over foreign litigants as respondents claim. U.S. courts will retain their power under the federal rules to compel discovery, to draw adverse inferences from failures to produce evidence, or to impose other sanctions. In determining whether such measures are appropriate and in fashioning an appropriate order, the court will have the benefit of a developed record.¹⁶

Respondents' argument that the Convention's procedures are merely optional rests on a confusion of judicial power with the propriety of its exercise. "The existence of the power to order a thing done does not resolve the question of the propriety of exercising that power, particularly in the international context." Oxman, 37 U. Miami L. Rev. at 740. In the international context, courts must be concerned not only with fairness to individual litigants but also with maintaining stability and order in our dealings with separate territorial sovereignties. *See Lauritzen v. Larson*, 345 U.S. 571, 582 (1953).¹⁷ The assertion of extraterrito-

¹⁵ Rule 28(b); *see* Brief for Petitioners at 31-32 & n.75.

¹⁶ *See* Brief for Petitioners at 35.

¹⁷ *See also* Brief for Petitioners at 29-31 & n.69. In the context of interstate commerce, the full faith and credit clause and the authority of the Court to interpret the Constitution provide a basis for resolving the

rial jurisdiction on the basis of "minimum contacts" does not relieve U.S. courts from the obligations of international judicial cooperation and restraint imposed by the Convention.

The Court's modern decisions have recognized that personal jurisdiction over a corporate defendant is a fluid concept based upon evaluation of a variety of factors and that the "presence" of a corporation in a forum or its "consent" to suit are merely constructs or legal fictions expressing a result.¹⁸ These decisions eschew the mechanical application of rigid categories in favor of a flexible approach which considers fairness to litigants as well as territorial limits in determining what cases a court may hear.¹⁹ The immediate effect of the Court's decisions permitting a forum to adjudicate any dispute between persons with whom it has the requisite "minimum contacts" has been to expand the reach of U.S. courts.²⁰ Yet the Court has also recognized the tension between concurrent jurisdiction and the sovereign powers of individual states.²¹

Precisely because U.S. courts have assumed broad extraterritorial jurisdiction, some deference to the interests of foreign sovereignties is required in the exercise of this power. The Convention creates an obligation of cooperation and restraint which respondents would have the Court ignore.

potential conflicts arising from concurrent jurisdictions. In the international context, there is no similar structure within which to harmonize concurrent jurisdictions. See Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 287-88 (1982). Insofar as a rational ordering of governmental relationships is possible, it must be achieved through treaties such as the Hague Evidence Convention or, in the absence of an applicable treaty, through the principle of comity.

¹⁸ See *International Shoe Co. v. Washington*, 326 U.S. 310, 316-18 (1945).

¹⁹ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *International Shoe Co. v. Washington*, 326 U.S. at 319.

²⁰ See *Shaffer v. Heitner*, 433 U.S. at 204-05.

²¹ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 293.

C. A First-Use Rule Is Supported by a Proper Analysis of Comity Considerations

By giving effect to the Convention, which represents a weighing and balancing of sovereign interests, the Court can avoid the task of balancing these interests itself. A proper balancing of such considerations, however, also supports a rule of first use. A first-use rule will avoid conflicts with French law and yet will not compromise the U.S. interest in assuring that "domestic litigants are afforded adequate opportunities to adjudicate their claims."²² In discussing comity, both respondents and the Solicitor General improperly denigrate France's interest in regulating evidence gathering activities conducted on French soil. A proper analysis of comity considerations does not permit such second-guessing of foreign sovereign interests.

1. A First-Use Rule Accommodates the Interest of France in Regulating Evidence Gathering in French Territory

In domestic actions, French law, like that of most civil law jurisdictions, vests in the judge rather than the parties responsibility for the discovery of evidence. The Republic of France has informed the Court that the taking of evidence on French territory requires the involvement or consent of the sovereign even where the evidence is to be used in proceedings abroad.²³ The Republic of France ratified the Convention intending it to provide the sole means by which discovery demands emanating from other signatory countries would be carried out on French soil.²⁴ To prevent the Convention's procedures from being circumvented by foreign litigants, France has enacted a blocking statute. The statute gives France the judicial means to put an end to practices which it regards as infringing on French sovereignty.²⁵

²² Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 21.

²³ Brief of Amicus Curiae the Republic of France in Support of Petitioners at 7-8.

²⁴ *Id.* at 2.

²⁵ See National Assembly Report No. 1814, A. Mayoud, Reporter for the Commission on Production and Exchanges, 36-37 (1980); Brief of

France could not have stated more clearly or unambiguously its strong interest in the use of Convention procedures by American litigants seeking evidence located in French territory. Attempts to gather evidence in France through other means violate its blocking statute as well as its judicial sovereignty. A rule requiring use of the Convention in the first instance accommodates this clearly articulated sovereign interest of France and, because relevant and necessary evidence can be collected through Convention procedures, holds conflicts between U.S. and French law to a minimum.

2. Respondents' and the Solicitor General's Proposed Comity Analyses Improperly Discount France's Statements of Its Own Sovereign Interests

Respondents baldly assert that France has "no vital interest involved in this litigation."²⁶ The Solicitor General's views are more circumspect and were formulated without the benefit of having seen the amicus brief filed by the Republic of France. Nonetheless, the Solicitor General's suggestions concerning a comity analysis do not give proper weight to the foreign sovereign interests at stake.

The Solicitor General's suggestion that a "more specific and concrete" interest must be found before resort to the Convention is justified improperly discounts France's statements of its own interests. In effect, the Solicitor General would require nations which follow the civil law tradition to justify their limitations on foreign evidence gathering in American common-law terms. While the Solicitor General recognizes the danger "that unbridled American discovery will infringe substantive protections" provided by foreign law,²⁷ it fails to recognize that the judicially controlled evidence gathering procedures followed in France and

Amicus Curiae the Republic of France in Support of Petitioners at 12-14; Brief for Petitioners at 13-14.

²⁶ Brief for Respondent and Real Parties in Interest at 27.

²⁷ Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 25.

other civil law nations are themselves substantive protections provided to those countries' citizens.²⁸

The Solicitor General's suggestion that whether the Convention is used should depend upon the nature or scope of the discovery in question likewise discounts France's statements of its own sovereign interests. Under French law, written discovery no less than depositions requires the involvement or consent of the sovereign. The procedures of the Convention provide for this involvement or consent.²⁹ The degree of intrusiveness of particular discovery requests is an appropriate factor for U.S. courts to consider only in deciding whether to compel discovery under the federal rules after Convention procedures have been exhausted.³⁰

3. A First-Use Rule is Workable and Does Not Compromise the U.S. Interest in Assuring Domestic Litigants an Opportunity to Adjudicate Their Claims

The Convention provides efficient and effective procedures for obtaining evidence located in France.³¹ Although Convention procedures are not in every instance precise equivalents or substitutes for federal discovery rules, the courts' broad power to control the discovery process can prevent any potential unfairness

²⁸ See Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 861-62 (1985); Brief for Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH as Amici Curiae in Support of Petitioners at 10-13.

²⁹ See Brief of Amicus Curiae the Republic of France in Support of Petitioners at 7-8 & n.8.

³⁰ The Brief for Compania Gijonesa de Navigacion, S.A. as Amicus Curiae in Support of Respondent carries the Solicitor General's "intrusiveness" argument further, asserting that Convention procedures should not be used if the discovery requests are (by American standards) "routine." Not only does this argument denigrate the significance of foreign sovereign interests, it would have courts disregard the Convention in precisely those situations where its use is likely to be most effective.

³¹ See Brief for Petitioners at 39-41; Brief of Amicus Curiae the Republic of France in Support of Petitioners at 18-27.

to domestic litigants which arguably could result from requiring use of Convention procedures. Further, should use of the Convention fail to produce necessary evidence, courts would, under a first-use rule, retain the power to order production and impose appropriate sanctions for non-compliance.

Convention procedures provide a full range of discovery options for obtaining evidence located in France.³² Use of the Convention procedures is not unduly expensive, time-consuming or burdensome, and, contrary to respondents' suggestion, the Convention can be used to obtain relevant documents located in France.³³

Domestic discovery procedures within the United States are not without costs, delays and potential for obstruction. Efforts to obtain evidence under domestic procedures can require costly and time-consuming discovery battles and may require employing local counsel as well as transcontinental or even international travel. In comparison, Convention procedures may often prove more economical and efficient.

Questioning the workability of a first-use rule, the Solicitor General marshalls four cases in which the Securities and Exchange Commission encountered some difficulty in using Convention procedures to obtain evidence located abroad.³⁴ These cases, however, all involved discovery against non-parties (ac-

³² See Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 Int'l Law. 35, 41 (1979); Brief for Amicus Curiae the Republic of France in Support of Petitioners at 21-22; Brief for Petitioners at 10-11, 39.

³³ Respondents' suggestion that France's reservation under article 23 of the Convention makes resort to the Convention futile is belied by the Republic of France's explanation of its policies with regard to the production of documentary evidence. France has told the Court that its declaration under article 23 does not impede international judicial assistance but is only intended to limit unfocused demands for documents by foreign lawyers acting without court supervision. Brief of Amicus Curiae the Republic of France in Support of Petitioners at 22-23 and Appendix A.

³⁴ See Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 15-19.

cused of complicity in securities fraud) by a U.S. administrative agency. As the Solicitor General's brief suggests, the SEC's experience with the Convention is atypical and bears little relevance to disputes between private parties such as that at issue here.

Where a government itself seeks evidence located in another nation, the relative sovereign interests at stake are clearly different than in the typical civil or commercial dispute between private parties. In part for that reason, there is a serious question whether cases brought by administrative agencies seeking to enforce their regulations were intended to be within the scope of the Convention at all.³⁵ The one French case discussed in the Solicitor General's brief, *In re Testimony of Constandi Nasser*, Trib. Admin. de Paris, 6eme section—2eme chambre, No. 51546/6 (Dec. 17, 1985), presented precisely this question.³⁶

³⁵ The Convention is expressly limited to "civil or commercial matters." Art. 1, Pet. App. 26a. These terms are not further defined. However, "civil law jurisdictions do not consider administrative matters—though civil in nature—to be within the purview of the term 'civil or commercial.'" *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 17 Int'l Legal Materials 1417, 1418 (1978). While some jurisdictions "accept the characterization as 'civil or commercial' given by the requesting authorities under their own law," others have indicated "that this determination should be made according to the views of the State addressed." *Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 24 Int'l Legal Materials 1668, 1671 (1985).

³⁶ By letter to the Court dated December 19, 1986, the Solicitor General has corrected the SEC's previous account of these proceedings. The *Nasser* case illustrates how far the French authorities will go to facilitate discovery that is conducted in accordance with the Convention.

In *Nasser*, a letter of request was issued by a federal district court to obtain the testimony of a non-party witness. The French Ministry of Justice expeditiously approved and forwarded the letter for execution, but execution was delayed by collateral attack, first before the Ministry of Justice and then through appeal to an administrative court. The

The difficulty experienced by the SEC in obtaining evidence abroad through the Convention is not an argument against a general requirement of first-use. Each of the cases cited by the Solicitor General involved an uncooperative foreign non-party witness over whom U.S. courts appear to have had no jurisdiction. Thus, domestic discovery procedures were not available to the SEC either in the first instance or as a last resort, and the witnesses had strong incentives to avoid the SEC's questions. Greater cooperation can reasonably be expected from parties to commercial disputes who intend to continue doing business in the United States and who are within the reach of U.S. courts.

III

RESPONDENTS' ARGUMENTS THAT THE CONVENTION DOES NOT APPLY TO THE DISCOVERY SOUGHT IN THIS CASE ARE INCORRECT

Respondents repeat the arguments of the decision below that the Hague Evidence Convention has no applicability to this case. These arguments lack support in the language and history of the Convention, and they have been rejected by every signator to the Convention which has made its views known to the Court, including the United States.

witness argued that the requests by the SEC were "administrative" rather than "civil" and thus outside the scope of the Convention. This raised a question of first impression as to which the language and negotiating history of the Convention leave room for divergent interpretations. The Ministry of Justice ruled against the collateral attack and opposed the appeal, seeking execution of the letter on behalf of the SEC. The administrative court held in the French government's and the SEC's favor. By then, however, the SEC was in the process of settling the underlying litigation in the U.S., and further action on the letter was not sought.

The presence of a question of first impression accounts for the delays encountered by the SEC in obtaining execution of its letter of request. In cases like the present one where no novel jurisdictional issues are present, prompt and effective execution can be expected. *See* Brief of Amicus Curiae the Republic of France in Support of Petitioners at 21.

Respondents advance the geographic fiction that the Convention is inapplicable to "preparatory acts" in France so long as the physical production of evidence occurs in the United States. There is no distinction to be found in the Convention's language or history between "preparatory acts" and the physical delivery of evidence to an opposing litigant. The discovery sought requires actions to be taken in French territory, and French law regards these actions as intrusions on its sovereignty. In urging the distinction between "preparatory acts" and the physical production of evidence, respondents are inviting the Court both to disregard the parties' construction of the treaty and also to substitute its view of French sovereign interests for those of the sovereign itself.

The claim that the Convention does not apply where a U.S. court has in personam jurisdiction over a foreign party also invents a distinction not found in the treaty or its history. The language of the Convention draws no distinction between parties and non-parties to litigation. It refers only to "persons" (articles 3 and 21) and "nationals" (articles 15 and 16). The drafting history of the Convention makes abundantly clear that its provisions apply equally to parties and non-parties. *See* Brief for Petitioners at 17-19.

The Solicitor General has told the Court that the decision below erred in its conclusion that the Convention has no applicability to the discovery requests here at issue.³⁷ The governments of France, Germany and the United Kingdom have also indicated that they regard the Convention as applicable to requests of this nature.³⁸ The decision below and the arguments of respondents are at odds with this practical construction of the treaty adopted

³⁷ *See* Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 7-10.

³⁸ *See* Brief of Amicus Curiae the Republic of France in Support of Petitioners at 8-12; Brief for the Federal Republic of Germany as Amicus Curiae at 5-6; Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners at 8.

by the contracting parties. *See Air France v. Saks*, 470 U.S. 392, 396 (1985).

CONCLUSION

Use of Hague Evidence Convention procedures should be required, both on the facts of this case and as implementation of a general rule. Accordingly, the judgment of the court of appeals should be vacated and the case remanded with appropriate instructions.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

**SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
PETITIONERS**

v.

**UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF IOWA
(DENNIS JONES, JOHN AND ROSA GEORGE,
REAL PARTIES IN INTEREST)**

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**BRIEF FOR THE UNITED STATES AND THE
SECURITIES AND EXCHANGE COMMISSION
AS AMICI CURIAE**

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39 pp

QUESTION PRESENTED

Whether a federal district court, adjudicating a private civil suit against a foreign national subject to the court's jurisdiction, should employ the procedures set forth in the Hague Evidence Convention for discovery of documents and information within the possession of the foreign national but located abroad.

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In the Supreme Court of the United States

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SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND
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v.

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BRIEF FOR THE UNITED STATES AND THE
SECURITIES AND EXCHANGE COMMISSION
AS AMICI CURIAE

INTEREST OF AMICI CURIAE

The United States is a party to the Hague Evidence Convention¹ and has a strong interest in promoting international judicial cooperation consistent with domestic law. The Securities and Exchange Commission, the agency charged by Congress with the enforcement of the federal securities laws, has in the past used the Convention's procedures in an effort to obtain evidence abroad and

¹ Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 *et seq.* (entered into force between the United States and France on Oct. 6, 1974), *reprinted at* Pet. App. 26a-41a.

thus has actual experience with the practical operation of its transnational discovery methods. This Court on three previous occasions has invited the United States to express its views on the question presented. See U.S. Amicus Br., *Anschuetz & Co. GmbH v. Mississippi River Bridge Authority*, No. 85-98, and *Messerschmitt Bolkow Blohm, GmbH v. Walker*, No. 85-99, petitions for cert. pending (U.S. *Anschuetz Br.*); U.S. Amicus Br., *Club Mediterranee, S.A. v. Dorin*, appeal dismissed and cert. denied, 469 U.S. 913 (1984) (U.S. *Club Med. Br.*); U.S. Amicus Br., *Volkswagenwerk A.G. v. Falzon*, appeal dismissed, 465 U.S. 1014 (1984) (U.S. *Falzon Br.*).

STATEMENT

Petitioners are aircraft-manufacturing corporations organized under the laws of France and owned by the government of that country (Pet. App. 1a). Although petitioners construct their aircraft in France, they advertise and sell them in the United States (*ibid.*). In 1980, one of petitioners' "short take-off and landing" aircraft was involved in a plane crash in Iowa. Respondents Dennis Jones, John George, and Rosa George brought this tort action against petitioners in the United States District Court for the Southern District of Iowa, alleging that they suffered personal injury as a result of defects in the plane (*ibid.*).

Petitioners and respondents both sought discovery, and discovery motions were referred by the parties' consent to a magistrate under 28 U.S.C. 636(c) (1). Respondents filed an initial request for production of documents; this request sought the flight manual, pilot's handbook, performance data and testing records of the airplane involved in the crash (Pet. App. 12a; J.A. A19-A20). Petitioners apparently complied with this initial discovery request, and they in turn propounded interrogatories and requested documents from respondents (Pet. App. 12a). Respondents then filed a further request for production of documents, as well as interrogatories and requests for admissions (J.A. A21-A38). In that second round of dis-

covery, respondents sought inspection reports and design specifications for the aircraft (J.A. A27-A29); requested admissions that petitioners had made certain claims about the aircraft in advertisements published in United States magazines (J.A. A21-A26; A36-A38); and propounded questions about the composition of those advertisements (J.A. A30-A35).

Petitioners declined to comply with the second discovery request and sought a protective order from the magistrate (Pet. App. 12a; J.A. A1-A11). They contended that the responsive information and documents could properly be produced only through the procedures set forth by the Hague Evidence Convention.² Petitioners also argued that production by means other than the Convention would violate a French "blocking statute" prohibiting transmittal of evidence for use in foreign judicial proceedings except as provided by international agreement or French law (J.A. A9-A10).³

² The Hague Evidence Convention provides three alternative methods for conducting evidence-taking proceedings abroad. Under the first method, a litigant may request the court where the action is pending to transmit a "Letter of Request" to the "Central Authority" in the country where the evidence is located. See arts. 1-2, 23 U.S.T. 2557-2558. The Central Authority, selected by the foreign government, then transmits the request to the appropriate foreign court, which conducts the evidentiary proceeding. See arts. 5-13, 23 U.S.T. 2560-2563. The foreign court, upon request, will conduct the evidentiary proceeding under procedures specified by the requesting court, unless those procedures are incompatible with internal law or impracticable. See art. 9, 23 U.S.T. 2561. Under the second method, the litigant may request that a diplomatic or consular officer of the country where the action is pending take evidence in the foreign country to which he is accredited. See arts. 15-16, 23 U.S.T. 2564-2565. Under the third method, the litigant may request that a specially appointed commissioner take evidence in the foreign country. See art. 17, 23 U.S.T. 2565. The three methods are similar to those identified by Fed. R. Civ. F. 28(b).

³ The French statute, enacted in 1980, provides (Pet. App. 47a-48a):

Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request,

The magistrate denied petitioners' motion and ordered compliance with respondents' discovery request (Pet. App. 11a-25a). The magistrate based his decision primarily upon his "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts and the potential interference with such proceedings which forcing compliance with foreign court procedures would cause" (*id.* at 24a). In response to petitioners' claim that discovery would violate the French blocking statute, the magistrate cited evidence that the statute "ha[s] not been strictly enforced in France" and noted that in any event "a party who is affected by the law may seek a waiver of its provisions from the appropriate French minister" (*id.* at 22a). The magistrate pointed out that the discovery sought—production of documents, responses to requests for admissions, and answers to interrogatories—"does not have to take place in France" and that the requested discovery was "not greatly intrusive or abusive" (*id.* at 25a). He concluded on balance that the "United States' interests are stronger than potential French interests" and ruled that resort to the Hague Convention was not required (*ibid.*).

Petitioners sought review of the magistrate's decision through a petition to the court of appeals for a writ of mandamus. Although the court of appeals agreed to consider the merits of the petition, it declined to grant the relief requested (Pet. App. 1a-10a). The court first concluded that the Hague Convention's procedures have no application to the discovery in question, stating (*id.* at 4a);

Although a minority of courts have adopted the position advanced by the Petitioners, in our opinion the better rule, which has been adopted by the vast

seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.

majority of courts, is that when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention.

The court specifically adopted the Fifth Circuit's view that "'matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention'" (*id.* at 5a, quoting *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 611 (5th Cir. 1985), petition for cert. pending, No. 85-98). While holding that "the Hague Convention does not apply to the discovery sought in this case," the court suggested that the Convention "will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign nonparties who are not subject to an American court's jurisdiction and compulsory powers" (Pet. App. 5a, 6a).

The court of appeals next considered whether the French blocking statute provides an independent ground for petitioners' objections to compliance with the discovery orders. The court agreed with the magistrate's balancing of the foreign and domestic interests, relying (Pet. App. 9a) on factors set forth in Section 40 of the Restatement of Foreign Relations Law of the United States (1965). The court suggested that petitioners, as corporations owned by the French government, "stand in a most advantageous position" to obtain a waiver of the blocking statute's requirements, and the court opined that petitioners' good faith in seeking a waiver would be relevant in the event the magistrate considered imposing sanctions for noncompliance with the discovery order (Pet. App. 10a).⁴

⁴ No question of sanctions under Fed. R. Civ. P. 37 is before this Court at this time.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the Hague Evidence Convention has no application in the present case. The Convention prescribes optional procedures, preferred by most foreign litigants, for parties to obtain discovery of documents and information located abroad. An American court, faced with objections to traditional American discovery methods on the ground that they would violate a foreign nation's law or clearly articulated policies, should give serious consideration to use of the Convention even though it has the power to require discovery through the traditional means. Principles of international comity should guide a court's decision whether to use the Convention in any particular case.

Comity is a flexible principle and does not require initial resort to the Convention whenever a foreign litigant objects to American discovery procedures. A rigid rule mandating "first use" of the Convention in all cases finds no support in the language or ratification history of the Convention and would fail to respond to the inevitable complexities of transnational discovery disputes. Rather, the question whether to employ the Convention should be based on a case-by-case comity analysis that takes into account the facts and circumstances surrounding the particular discovery request and the foreign objections thereto.

A proper comity analysis must begin with a reasoned evaluation of the domestic and foreign interests. The United States' interest generally will center on its obligation to assure that domestic litigants are afforded adequate opportunities to adjudicate their claims. Foreign interests that may merit accommodation from United States courts include such concerns as preservation of territorial integrity, prevention of abusive evidence-gathering, or policies safeguarding substantive liberty, property, or privacy interests. In determining whether or not to utilize the Convention, the court should consider whether the Convention can provide fair, efficient, and effective discovery, taking into account such factors as

whether the evidence can be obtained through the Convention and the expense, burden, and delays that might result from its use. The United States has a strong interest in avoiding conflict with foreign nations, and American courts should thus be mindful of the need to refrain, when feasible, from ordering discovery that would violate a foreign nation's laws or policies. Because the district court is in the best position to apply a proper comity analysis in the first instance, the decision should be vacated and the case remanded for that purpose.

ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE HAGUE EVIDENCE CONVENTION HAS NO APPLICATION TO THE DISCOVERY REQUESTS AT ISSUE HERE, AND THE CASE SHOULD BE REMANDED FOR A DETERMINATION WHETHER RESORT TO THE CONVENTION SHOULD BE REQUIRED PURSUANT TO A PARTICULARIZED COMITY ANALYSIS

The Hague Evidence Convention prescribes procedures by which litigants involved in civil and commercial transnational disputes may obtain evidence from abroad. The Convention was formulated through the Hague Conference on Private International Law⁵ and represents an attempt to encourage evidence-gathering methods that are both "tolerable" in the State of execution and * * * 'utilizable' in the forum of the State of origin where the action is pending." S. Exec. A, 92d Cong., 2d Sess. 11 (1972). The Convention helps bridge the significant procedural obstacles encountered when litigants seek evidence located in a foreign country that employs a different legal system. See *id.* at VI; S. Exec. Rep. 92-95, 92d Cong., 2d Sess. 1 (1972); *Report of United States Dele-*

⁵ The Hague Conference is an international organization that promotes cooperation in the development of uniform rules of private international law. See Reese, *The Hague Conference on Private International Law: Some Observations*, 19 Int'l Law. 881 (1985).

gation to Eleventh Session of Hague Conference on Private International Law, 8 Int'l Legal Materials 785, 806 (1969).

Although the Hague Evidence Convention is a significant attempt to foster international judicial cooperation, its proper interpretation has become the subject of increasing litigation. Foreign defendants, who typically oppose discovery in United States courts, have frequently asserted that the Convention operates as the exclusive and mandatory method by which domestic plaintiffs may obtain discovery abroad. This appears to have been the thrust of petitioners' argument below (see Pet. App. 4a, 12a), although they have since retreated from that position (see Pet. Reply Br. 5-6). Domestic plaintiffs, by contrast, have objected to use of the Convention, maintaining that it is an expensive and ineffective method for conducting discovery. They have urged that the Convention has no application whatsoever when the foreign defendant is subject to the jurisdiction of a United States court and where production of the information will occur in this country. This is the interpretation adopted by the court of appeals below (Pet. App. 4a-7a).

In our view, both of these extreme interpretations are incorrect. As we have previously explained at greater length (see U.S. *Ansuetz* Br. 8-11; U.S. *Club Med* Br. 3, 7-9; U.S. *Falzon* Br. 4-7), we think it clear that the Convention provides optional, rather than exclusive, methods for obtaining discovery from foreign parties. As a general matter, United States courts have broad authority to demand that foreign nationals subject to their jurisdiction produce evidence located abroad.⁶ The

⁶ See, e.g., *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Societe Internationale v. Rogers*, 357 U.S. 197, 204-206 (1958); *In re Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983); *United States v. First National City Bank*, 396 F.2d 897, 900-901 (2d Cir. 1968); *Federal Maritime Commission v. DeSmedt*, 366 F.2d 464, 468-469 (2d Cir.), cert. denied, 385 U.S. 974 (1966); *SEC v. Minas de Artemisa S.A.*, 150 F.2d 215, 217 (9th Cir. 1945);

Hague Evidence Convention influences, but does not control, the exercise of that power. The Convention's language, history, and purposes alike indicate that it was not intended to prescribe the exclusive means by which American plaintiffs might obtain foreign evidence (see U.S. *Ansuetz* Br. 8-11). American courts are virtually unanimous in concluding that the Convention's procedures are not exclusive.⁷

Equally erroneous in our view is the court of appeals' conclusion, at the opposite extreme, that "when the dis-

International Society for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 441 (S.D.N.Y. 1984); *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1144-1145 (N.D. Ill. 1979); *Volkswagenwerk, A.G. v. Superior Court*, 123 Cal. App. 3d 840, 856-857, 176 Cal. Rptr. 874, 883-884 (1981). See also Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 Nw. U. L. Rev. 487, 502-504 (1969); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum. L. Rev. 1031, 1053-1054 (1961); Note, *Strict Enforcement of Extraterritorial Discovery*, 38 Stan. L. Rev. 841, 843 (1986). Cf. Restatement (Second) of Foreign Relations Law of the United States §§ 39, 40 (1965).

⁷ See, e.g., *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 788 F.2d 1408, 1410-1411 (9th Cir. 1986); *In re Messerschmitt*, 757 F.2d at 731; *In re Ansuetz*, 754 F.2d at 606-614; *Lowrance v. Weinig*, 107 F.R.D. 386, 388-389 (W.D. Tenn. 1985); *Work v. Bier*, 106 F.R.D. 45, 52-53 (D.D.C. 1985); *Slauenwhite v. Bekum Maschinenfabriken, GmbH*, 104 F.R.D. 616, 618-619 (D. Mass. 1985); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. at 444-447; *Compagnie Francaise D'Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 27-28 (S.D.N.Y. 1984); *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. 42, 48-50 (D.D.C. 1984); *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919-920 (S.D.N.Y. 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 519-524 (N.D. Ill. 1984); *Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH v. Starcher*, 328 S.E.2d 492, 497 (W.Va. 1985); *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876, 879-880 (1982). Some foreign commentators continue to urge that the Convention is exclusive. See, e.g., Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 Colum. J. Transnat'l L. 231 (1986). However, we are aware of no reported decisions supporting that position.

strict court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession" (Pet. App. 4a). Nothing in the language or history of the Convention suggests that its procedures were meant to be confined to situations where the *production* of evidence takes place abroad, and to exclude situations where the *gathering* of evidence, or other preparatory steps, are to occur on foreign soil. Neither the United States nor foreign signatories to the Convention have ever subscribed to the interpretation adopted by the court below. And the court of appeals' narrow interpretation would scarcely serve the interests of domestic litigants, for it would render the Convention, an often valuable tool for obtaining information abroad, unavailable and thus useless in the most common discovery contexts.

We believe that the Hague Convention is potentially applicable to discovery requests of the sort involved here and that principles of international comity should guide a court's determination whether the Convention's procedures should be employed in any particular instance. Although resort to the Convention is not mandatory, it offers a promising mechanism for reducing international friction resulting from transnational application of American discovery techniques. American courts should be mindful of the need to refrain, when feasible, from ordering discovery that would violate the laws or clearly articulated policies of a foreign government. Trial judges should thus give serious consideration to use of the Convention where to do so would not unduly infringe upon the interests of the United States or the rights of its litigants.

Although it has increasingly come to be recognized that resort to the Convention should be governed by a comity analysis, there remains considerable disagreement as to how that inquiry should be conducted in practice, and as to what its proper outcome should typically be. In the pages that follow, we outline our view of the proper comity analysis, and suggest factors that may be par-

ticularly important in light of the specific discovery requests at issue here.

A. Comity Does Not Require First Use Of The Hague Convention In Every Case Where A Foreign Litigant Objects To American Discovery Procedures

This Court has described the concept of international comity as follows:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-164 (1895).⁸ When a United States court encounters objections to domestic discovery from a foreign signatory of the Hague Convention, it should analyze the interests of the United States and the foreign country to determine whether the Convention's procedures should be employed. Absent direct guidance from Congress, an individualized comity analysis provides the best—indeed, the only—available method for resolving conflicts between domestic and foreign interests. Properly conducted, a comity analysis gives the district court the necessary flexibility to consider the ~~multitude and~~ various factors that may be relevant in any particular case.

Petitioners seem to agree (Reply Br. 5-6) that resort to the Hague Convention should be governed by principles of comity. They contend, however, that comity principles, as a general rule, "require that resort be made

⁸ See, e.g., *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984); *United States v. First National Bank*, 699 F.2d 341, 345-347 (7th Cir. 1983); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1288-1291 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *United States v. First National City Bank*, 396 F.2d at 901-905. Cf. *Societe Internationale v. Rogers*, 357 U.S. 197.

to the Convention in the first instance, at least when the issue is timely raised" (Pet. 16). Because a comity analysis is "so flexible and far reaching," petitioners say, "trial courts need clear guidelines or presumptions to apply" lest their findings be "conclusory and result-oriented" (*id.* at 17). In petitioners' view, "[a] rule ordinarily requiring resort to the Convention in the first instance" is necessary to ensure "that principles of comity are given adequate consideration" (*ibid.*).

We cannot accept petitioners' submission in this respect. The American concept of international comity favors an individualized, case-by-case weighing of domestic and foreign interests, not per se rules of the sort petitioners urge. Neither the Convention itself nor its ratification history supports petitioners' proposed "first use" rule, and such an inflexible rule would prove unworkable in practice given the almost infinite variety of transnational discovery disputes. And because there remain some questions about the Convention's effectiveness as a general matter in producing needed discovery, we believe that a "first use" requirement would be unjustified at this time.

1. The American concept of international comity, from its earliest origins, has eschewed inflexible rules. See *Hilton v. Guyot*, 159 U.S. at 164-165.⁹ This Court has often stated that comity requires the exercise of judg-

⁹ As this Court noted in *Guyot* (159 U.S. at 164-165), Justice Story's *Commentaries on the Conflicts of Law* (first published in 1834) stated that "there is indeed great truth" in the observation

"that comity is, and ever must be uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions * * *."

J. Story, *Commentaries on the Conflicts of Law* § 28, at 28-29 (8th ed. 1833) (quoting *Saul v. His Creditors*, 5 Mart. (n.s.) 569, 596 (La. 1827)).

ment rather than adherence to mechanical formulae.¹⁰ The lower courts agree that "[s]ince comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain." *Lake Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (footnote omitted). "Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case." *United States v. First National City Bank*, 396 F.2d 897, 901 (2d Cir. 1968).

This Court's decision in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), specifically recognizes that transnational discovery disputes cannot be resolved through per se rules. A unanimous Court there refused to hold that a foreign company is excused from production of documents whenever foreign law prohibits production, noting that a general rule excusing disclosure would undermine substantive United States interests and encourage evasion of domestic law (357 U.S. at 205-206). The Court noted that discovery under the Federal Rules "is sufficiently flexible to be adapted to the exigencies of particular litigation" and that "[t]he propriety of the use to which it is put depends upon the circumstances of a given case" (*id.* at 206).

¹⁰ Relying in part on comity principles, this Court recently concluded that foreign government instrumentalities established as independent juridical entities should normally be treated as distinct from their sovereigns, but refused to announce a "mechanical formula" for determining when that status should be disregarded. See *First National City Bank v. Banco Para el Comercio*, 462 U.S. 611, 626-627, 633 (1983). See also *Banco Nacional v. Sabbatino*, 376 U.S. 398, 428 (1964) (refusing to establish "an inflexible or all-encompassing rule" concerning acts of state); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 579 (1908) (noting that the *Guyot* decision "shows that how far foreign creditors will be protected and their rights enforced depends upon the circumstances of each case").

2. The fact that this case involves the interpretation of a treaty provides no reason for the Court to depart from its traditional reluctance to replace a discriminating comity analysis with mechanical rules. Petitioners do not contend that the Hague Evidence Convention itself imposes a "first use" requirement, and neither its language nor its ratification history supports mandatory first use. Indeed, such a requirement would be inconsistent with the understanding that the Convention "makes no major changes in United States procedure and requires no major changes in United States legislation or rules." S. Exec. Rep. 92-25, *supra*, at 5 (quoting Philip Amram, United States representative and rapporteur at the Hague Conference). The lower federal courts, advertent to this ratification history, have generally agreed that the Convention's procedures need not necessarily be exhausted.¹¹

A rule dictating mandatory first use of the Convention would also be unworkable in practice. The Convention

¹¹ The Fifth and Ninth Circuits, like the court of appeals below, have rejected the first-use requirement. *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 788 F.2d at 1411; *In re Messerschmitt*, 757 F.2d at 731; Pet. App. 7a. Most federal district court decisions have declined to impose that requirement. See, e.g., *Lowrance v. Weinig*, 107 F.R.D. at 388-389; *Work v. Bier*, 106 F.R.D. at 54-56; *Slauenwhite v. Bekum Maschinenfabriken, GmbH*, 104 F.R.D. at 618-619; *International Society for Krishna Consciousness v. Lee*, 105 F.R.D. at 449; *Compagnie Francaise D'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. at 32; *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. at 919-920; *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. at 519-524. However, a few federal district courts, and a somewhat larger number of state courts, have required first resort to the Convention, at least in certain circumstances. See *Laker Airways, Ltd. v. Pan American World Airways*, 103 F.R.D. at 51; *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 n.3 (E.D. Pa. 1983); *Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH v. Starcher*, 328 S.E.2d at 506; *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d at 243-244, 186 Cal. Rptr. at 879-880; *Vincent v. Ateliers de la Motobecane S.A.*, 193 N.J. Super. 716, 721-724, 475 A.2d 686, 689-691 (1984); *TH. Goldschmidt A.G. v. Smith*, 676 S.W.2d 443, 445 (Tex. Ct. App. 1984).

has been ratified by numerous countries that, in turn, have markedly different legal systems and varying attitudes toward American discovery procedures.¹² Notably, 12 of the 17 signatory states have executed declarations under Article 23 of the Convention restricting, in whole or in part, pretrial discovery of documents.¹³ The Convention is potentially available for application in a broad range of civil and commercial litigation—ranging from antitrust actions to ordinary tort suits—and a foreign nation's reaction to a discovery request could well depend in part on the nature of the underlying action. Most important, there remain some questions concerning the Convention's effectiveness as a general matter in producing needed discovery. Under these circumstances, United States courts should have discretion to determine whether the Convention should be utilized in any particular case. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) ("The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.").

3. The federal government's limited experience with the Convention's procedures also counsels against adoption of an inflexible first-use rule. On four recent occasions, the Securities and Exchange Commission has attempted to employ the Convention's procedures to obtain foreign evidence for use in enforcement actions involving insider trading in violation of the federal securities

¹² Apart from the United States, the Convention is in force in Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, and the United Kingdom.

¹³ See 7 *Martindale-Hubbell Law Directory* (pt. VII) at 15-19 (1986); Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 771-777 (1983).

laws.¹⁴ The Commission twice employed the Convention's procedures to obtain non-party evidence of insider trading in *SEC v. Certain Unknown Purchasers of the Common Stock of, and Call Options for the Common Stock of, Santa Fe International Corp.*, No. 81 Civ. 6553 (WWC) (S.D.N.Y. filed Oct. 26, 1981). See *Securities Exchange Act Release Nos. 9484, 9485*, [1981-1982] Fed. Sec. L. Rep. (CCH) ¶ 98,323 (Oct. 26, 1981). The Commission sought to secure documents and testimony from third-party witnesses residing in England and France. The English request ultimately yielded useful evidence, although the process consumed nine months and entailed the expenditure of over \$40,000 in foreign counsel fees.¹⁵ After two and one-half years of litigation in French courts, however, the French request failed to produce the requested testimony.¹⁶

¹⁴ The Commission has a particularly keen need to obtain foreign evidence in carrying out its responsibilities for enforcement of federal securities laws in internationalized capital markets. See Fedders, *Policing Internationalized U.S. Capital Markets: Methods to Obtain Evidence Abroad*, 18 Int'l Law. 89 (1984).

¹⁵ The Commission sought evidence from a hotel, a credit card company, and two individuals who had acted as stockbrokers for purchases of Santa Fe securities shortly before the merger announcement. The federal district court issued letters of request to the British Central Authority on July 25, 1983. Upon presentation of the request, an English Master ordered that the evidence be given. The credit card company and hotel complied. However, the two individuals refused to comply, arguing that the Commission's requests were improper and would violate bank secrecy laws. On February 23, 1984, after briefing and four days of oral argument, the English court ordered the two individuals to testify. *In re Evidence (Proceedings in Other Jurisdictions) Act 1975* (Q.B. Feb. 23, 1984) (Drake, J.), reprinted in 23 Int'l Legal Materials 511 (1984). The witnesses testified two months later.

¹⁶ The federal district court issued letters of request in May 1983. The French witnesses contested the request. A French tribunal ultimately granted the Commission's request for testimony on December 17, 1985. *In re Testimony of Constandi Nasser*, Trib. Admin. de Paris, 6ème section—2ème chambre, No. 51546/6 (Dec. 17, 1985). This victory proved, however, to be pyrrhic. The witness

The Commission also employed the Hague Convention procedures on two occasions to obtain non-party evidence of insider trading in *SEC v. Banca della Svizzera Italiana, et al.*, No. 81 Civ. 1836 (MP) (S.D.N.Y. filed Mar. 27, 1981). The Commission sought documents and testimony from third-party witnesses residing in Italy and Guernsey. In both cases, letters of request issued pursuant to the Convention's procedures failed to provide a significant portion of the requested evidence.¹⁷ The Italian proceedings consumed two months and \$20,000 in court costs and foreign counsel fees. The Guernsey proceedings

refused to testify and the French court, in response, imposed a minor fine. The *Santa Fe* litigation was settled on February 26, 1986.

¹⁷ The Italian request, issued by the federal court on Aug. 9, 1985, was directed to an SEC-registered broker-dealer in Milan and to certain individuals affiliated with him. The Court of Appeals of Milan, by decree dated September 10, 1985, authorized the letter of request and directed its execution by October 2, 1985. The Magistrate's Court of Milan took testimony from the witnesses but declined to compel production of documents in light of Italy's declaration, under Article 23 of the Convention, that it will not execute pretrial requests for documents. *Statement on the Examination of Witnesses as Requested by a Foreign Letter Rogatory* (Pret. Milano, Italy Oct. 2, 1985).

The Guernsey request, issued by the federal court on September 20, 1985, was directed to a Guernsey banking institution and concerned testimony and documents relating to the identity of the beneficial owners of an account utilized to execute certain questionable transactions. A Guernsey court ordered two witnesses to appear and to comply with the letter rogatory. On October 7, 1985, the witnesses moved in Guernsey to set aside the order, contending that the requested discovery was forbidden by Guernsey law. On March 11, 1986, the Deputy Bailiff of Guernsey denied the Commission's request for assistance on the ground that the testimony sought was a "search for defendants" and thus "fishing in nature." *In re Evidence (Proceedings in Other Jurisdictions) Act 1975 (Guernsey) Order 1980* (Stat. Inst. 1980 No. 1956). A Guernsey appeals court dismissed the Commission's appeal from that order as moot following a decision of a United States court resolving other aspects of the case in the Commission's favor. See *SEC v. Tome*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,762 (S.D.N.Y. June 3, 1986).

consumed eight months and over \$50,000 in foreign counsel fees.

The Commission's experience with Hague Convention procedures, which has not been entirely positive, may well be atypical. The Commission is a government enforcement agency, whereas requests for discovery under the Convention are more commonly made by private parties. The Commission has resorted to the Convention only four times, each request being directed to a non-party rather than to a party before the court, and each request being made in the context of a fraud suit rather than the more typical negligence or contract action. The State Department informs us that private plaintiffs in the latter sorts of litigation have found resort to the Convention more successful. The Commission's experience, however, does buttress our belief that adoption of any blanket presumption mandating "first use" of the Convention in all cases would be unwise. A number of courts have expressed concern that resort to the Convention might impose unjustified hardships on domestic litigants—frequently individual tort plaintiffs—who may lack the legal and financial resources needed to pursue their requests in foreign tribunals.¹⁸

¹⁸ See, e.g., *Pain v. United Technologies Corp.*, 637 F.2d 775, 788-790 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981) ("there can be little doubt that the cost to the litigants of employing such procedures would be exceedingly high"); *Gebr. Eickhoff Maschinenfabrik, mbH. v. Starcher*, 328 S.E. 2d at 506 (suggesting that there may be difficulties inherent in resort to the Convention); *Work v. Bier*, 106 F.R.D. 45, 54-55 (D.D.C. 1985) (discussing inadequacies in German procedures under the Convention, and the problem of obtaining evidence in admissible form); *International Society for Krishna Consciousness v. Lee*, 105 F.R.D. at 450 (suggesting that Convention procedures are "quite slow and costly"); see also Struve, *Discovery from Foreign Parties in Civil Cases before U.S. Courts*, 16 N.Y.U. J. Int'l L. & Pol. 1101, 1111 (1984) ("by comparison with the means of discovery provided by the Federal Rules of Civil Procedure, the Hague Convention represents a mode of discovery which is significantly less certain, less effective, more costly and more burdensome"). A rule mandating presumptive first use of the Convention could also impose tactical burdens on domestic litigants,

In sum, we see no need or justification for a blanket presumption requiring domestic plaintiffs to resort to the Hague Convention before employing the domestic discovery methods made available by federal or state rules. Instead, the question whether to employ the Convention's procedures should be based upon an individualized comity analysis that takes into account the particular facts and circumstances surrounding the discovery at issue. The ultimate determination, like the disposition of other discovery matters, should remain within the considered discretion of this Nation's trial courts, which are "in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times Co.*, 467 U.S. at 36.¹⁹

B. The Decision Below Should Be Vacated And The Case Should Be Remanded For The Application Of A Proper Comity Analysis

The United States has repeatedly maintained that American courts should give serious consideration to the use of the Hague Evidence Convention whenever a foreign litigant from a signatory nation (where the evidence is located) timely and clearly articulates his country's objections to the use of American discovery methods (U.S. *Anchuetz Br.* 11-12; U.S. *Club Med. Br.* 9-11). A court

requiring them to pursue discovery through possibly cumbersome procedures, while the foreign litigant could take full advantage of this Nation's liberal discovery methods. The resulting lack of mutuality in discovery could alter litigants' judgments about settlement and trial strategy and could otherwise impair the domestic judicial process. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."); see also 4 J. Moore, *Moore's Federal Practice* ¶ 26.52 (2d ed. 1984). Notably, the United States freely permits litigants in foreign tribunals to use its liberal discovery methods when they seek evidence located in this country. See 28 U.S.C. 1782.

¹⁹ See, e.g., *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. at 707-709 (discovery sanctions); *Herbert v. Lando*, 441 U.S. 153, 176-177 (1979) (relevance determinations); *Societe Internationale v. Rogers*, 357 U.S. at 213 (discovery sanctions).

should carefully consider the domestic and foreign interests and provide a reasoned explanation of its decision to conduct discovery through the Hague Convention, through American discovery procedures, or through a combination of those devices. In the present case, petitioners contended that the discovery sought by respondents would be objectionable to the Republic of France. Faced with that contention, the court of appeals erred in failing to apply comity principles in reviewing the magistrate's decision to forgo use of the Hague Convention. This Court, following its normal practice, should vacate the court of appeals' decision and remand the case for application of the correct legal standard. See, e.g., *Anderson v. Liberty Lobby, Inc.*, No. 84-1602 (June 25, 1986), slip op. 14. Cf. *Schlagenhauf v. Holder*, 379 U.S. 104, 111-112 (1964).

Courts and commentators have formulated various tests to guide comity analyses under international law.²⁰ Ulti-

²⁰ Section 40 of the Restatement (Second) of Foreign Relations Law of the United States (1965) suggests consideration of five factors to resolve international conflicts of law: (a) the "vital interests" of each state; (b) the resulting hardships to the affected party; (c) the extent to which conduct takes place in the foreign state; (d) the nationality of the person; and (e) the extent to which either state may be able to achieve compliance with its rules. In the past, courts have often looked to Section 40 for guidance in international discovery disputes. See, e.g., *Compagnie Francaise D'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. at 29-32.

In addition, the American Law Institute's revised Restatement includes a specific provision dealing with international conflicts arising from foreign discovery. See Restatement (Revised) of Foreign Relations Law of the United States § 437 (Tent. Draft No. 7, 1986) (approved May 14, 1986). The provisions state (*id.* § 437 (1)(c)) that United States courts

should take into account the importance to the * * * litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which non-compliance with the request would undermine important inter-

ately, however, "what is required is careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case." *United States v. First National City Bank*, 396 F.2d at 901. In our view, the essential elements of any comity analysis must include (1) a reasoned evaluation of the domestic and foreign interests and (2) an attempt to accommodate, to the extent feasible, legitimate foreign concerns.

1. a. The central domestic interest is generally the same in any international discovery dispute. The United States has a fundamental obligation to assure that domestic litigants are afforded adequate opportunities to adjudicate their claims. This Court has often recognized "the importance of ensuring that potential litigants have unimpeded access to the courts." *Seattle Times*, 467 U.S. at 36 n.22. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *NAACP v. Button*, 371 U.S. 415, 429-431 (1963); see also *Mitsubishi Motors Corp. v. Solem Chrysler-Plymouth, Inc.*, No. 83-1569 (July 2, 1985), slip op. 26-27 (Stevens, J., dissenting). And it is well settled that a United States litigant is generally entitled to adjudicate his claim in accordance with the laws of the local forum. See Restatement (Second) of Conflicts of Laws §§ 122, 127 (1971).

ests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

Section 437 and its accompanying comments have proven controversial, particularly insofar as they suggest that foreign discovery should in all instances proceed by court order (see Section 437 comment (a) & reporter's note 2) and that discovery should be limited to "directly relevant" information (*ibid.*). See, e.g., Struve, *supra*, 16 N.Y.U. J. Int'l L. & Pol. at 1105-1107 (stating that "in view of the lack of prior authority supporting the Reporter's position, it is questionable whether the restrictions upon the scope of discovery contained in [Section 437] accurately represent the law as it is or the law as it should be"). The Justice Department has informed the ALI of its objections to several aspects of the proposed revision.

American jurisprudence provides that an important element of the litigant's right to judicial access is the opportunity to discover the pertinent facts surrounding his claim. That element finds explicit recognition in the discovery provisions of the Federal Rules of Civil Procedure. Those provisions are central to the conduct of federal judicial proceedings. The "pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules." *Hickman v. Taylor*, 329 U.S. 495, 500 (1947). Discovery is the preferred method by which parties may narrow the basic issues and ascertain the existence of facts germane to those issues, ensuring that "civil trials in the federal courts no longer need be carried on in the dark" (*id.* at 501).

The federal discovery provisions place a high premium on disclosure. "Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties." *Seattle Times*, 467 U.S. at 30 (footnote omitted). "But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action.'" *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (emphasis supplied by the Court). Thus, the ultimate goal of the Federal Rules is efficient as well as effective discovery.

b. The precise nature of the foreign interests at stake in discovery controversies has not been well articulated by the courts or by foreign litigants in the past. Foreign parties have typically objected to American discovery methods on the ground that such devices violate their home country's "judicial sovereignty." But such assertions often have an abstract quality and do little, in and of themselves, to elucidate the substantive foreign interests at stake. Courts should understand that assertions of "judicial sovereignty" often incorporate legitimate notions of territorial integrity—a reluctance to permit

foreign litigants to invade one's borders, literally or figuratively, for the purpose of seizing evidence. Objections based on "judicial sovereignty" are often advanced by litigants from nations that employ the civil rather than the common law, nations in which evidence-gathering is usually conducted by judicial officers rather than by private parties. In that context, assertions of "judicial sovereignty" may reflect an understandable reluctance to forfeit the moderating effects of judicial supervision and to expose one's citizens to unpredictable and potentially abusive evidentiary demands. On the other hand, assertions of "judicial sovereignty" may simply illustrate a foreign nation's desire to protect its nationals from liability, or reflect a preference for its own mode of dispute resolution instead of ours.

In our view, assertions of foreign "judicial sovereignty" must be evaluated in light of the established American principle (see note 6, *supra*) that a United States court may order a foreign national, properly subject to the court's jurisdiction, to produce evidence located abroad. As a general matter, it is not unreasonable in principle for this Nation's courts to subject foreign corporations doing business here to the same judicial procedures that are applied to domestic corporations. In the instant case, for example, petitioners, corporations owned by the Republic of France, have elected to conduct operations in the United States and compete in the domestic market. Petitioners have advertised and sold their aircraft in the United States and presumably have profited from doing so. One of petitioners' aircraft has now unfortunately crashed in Iowa, and respondents seek to recover for their loss. Under these circumstances, an abstract claim of "judicial sovereignty" cannot equate to a right—indeed, it would be an extraordinary privilege—to have all of the benefits of access to American markets, yet to be free from the burdens that American judicial procedures generally impose.²¹

²¹ This Nation's courts, of course, may exercise jurisdiction over a foreign party only if the party's contacts with the forum are

Foreign objections to American discovery requests should also be greeted with caution where it is alleged that compliance would violate a foreign law in the nature of a "blocking" statute. Blocking statutes, of which the French law involved here (Pet. App. 47a-48a, 57a) is an extreme (and not necessarily typical) example, generally forbid foreign citizens to produce evidence abroad. The French blocking statute prohibits French nationals from disclosing information only when it will be used against them in a judicial or administrative proceeding, permitting them to divulge information voluntarily to any entity but a court or an administrative body. A number of commentators have interpreted the French statute to express little more than simple hostility to American law.²² In our view, objections founded merely on hostility

sufficient "to make it reasonable and just" for the domestic forum to adjudicate the dispute. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952). Once jurisdiction over a foreign party has properly attached, the court may require that party to produce evidence regardless whether it is located in this country or abroad. But the United States is "not the only nation to enforce its laws extraterritorially." Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, n.1 (1981) (citing examples). While foreign governments often urge that any claim for production of evidence violates international law, it is not clear whether they themselves would decline to order production of evidence located abroad. A German commentator has suggested that "European courts make a similar claim, although this claim is hidden behind a different configuration of the relevant legal institutions and norms." P. Schlosser, *Der Justizkonflikt zwischen den USA und Europa* 44 (1985) (English Summary). "One can conclude," he adds, "that there is no rule in international public law which limits the authority of national courts and agencies to require the cooperation of foreign parties in discovery and to impose sanctions for refusals in so far as this also can be done in a similar situation to a domestic party" (*id.* at 45).

²² The French blocking statute has been widely interpreted to evidence hostility both to this Nation's antitrust law and to its judicial procedures. See, e.g., Toms, *supra*, 15 Int'l Law. at 586; Herzog, *The 1980 French Law on Documents and Information*, 75 Am. J. Int'l L. 382 (1981). One commentator, examining the legislative report that accompanied the French blocking statute, agreed that the law "was 'never expected or intended to be enforced against

to American law should be approached with some skepticism in any proper comity analysis.

On the other hand, foreign nations will often have more specific and concrete interests that merit accommodation from United States courts. Foreign laws may provide particular protection to various liberty, property, and privacy interests, according business secrets or confidential communications (for example) special immunity from disclosure. Foreign nations may also provide testimonial privileges that are generally absent in this Nation's courts. In these instances, a foreign government may have understandable concerns that unbridled American discovery will infringe substantive protections provided to its citizens.

As we have suggested above, moreover, foreign assertions of "judicial sovereignty"—to the extent that they embody legitimate concerns about territorial integrity and prevention of evidential extravagance—may also merit accommodation from United States courts. In weighing such claims, the nature and scope of the requested discovery will often be of central concern. Ordering that a foreign citizen be deposed on a foreign nation's soil obviously works a greater affront to that nation's "territorial integrity" than (to take an example from the instant case) requiring a foreign corporation doing business here to make admissions that it has published advertisements in American magazines. See J.A. A21-A26. Indeed, this Nation's courts, sensitive to the territorial sovereignty of foreign nations, have generally required use of the Hague Convention where domestic

French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts." Note, *supra*, 38 Stan. L. Rev. at 864 (quoting *Adidas (Canada) Ltd. v. S.S. Seatrain Bennington*, No. 80 Civ. 1922 (S.D.N.Y. May 30, 1984)). We have lodged an English translation of the French legislative report, obtained from the Stanford Law Review (see 38 Stan. L. Rev. at 846 n.22), with the Clerk of this Court. See also *Graco*, 101 F.R.D. at 514 (noting that the foreign litigant had failed to identify a single case in which the French blocking statute's sanctions had been imposed).

litigants seek the involuntary deposition of a party abroad or the production of evidence from persons outside the court's jurisdiction. See, e.g., *Anschuetz*, 754 F.2d at 615. And when a foreign litigant expresses his nation's concern to prevent excessive and abusive evidence-gathering, the nature and scope of the discovery sought will again be of critical importance.

We leave it to foreign litigants and their governments to elaborate their interests in appropriate cases. The important point, in our view, is that they clearly identify the specific interest at stake and explain how that interest would be adversely affected by the particular discovery sought. It is certainly conceivable that petitioners could identify more particularized substantive interests than those illuminated in the prior proceedings. On remand, the foreign interests in this case should be reexamined.

2. Once a foreign litigant has elaborated his nation's concerns, the American court should attempt, to the extent feasible, to accommodate those concerns in the discovery process. The chief goal of the comity process is, of course, to prevent international friction. The use of the Hague Evidence Convention can provide an effective means of achieving that goal. However, as a central component of its comity analysis, the court must critically consider whether or not the Convention can provide fair, efficient, and effective discovery, taking into account such factors as whether the evidence can be obtained through the Convention mechanisms and the expense, burden, and delays that might result from its use.

Resort to the Convention will inevitably entail some measure of added expense and inconvenience, whether in the form of translator's costs, foreign legal fees, or the inability to obtain evidence in precisely the form that one could secure it in domestic discovery.²³ If these transac-

²³ As Judge Wilkey explained in *Pain v. United Technologies Corp.*, 637 F.2d at 788-790 (footnotes omitted; emphasis in original):

Although the Hague Evidence Convention provides a mechanism whereby the recipient nation's executing authority is required to assist an American court with such compulsory

tion costs are minor relative to the scope of the underlying litigation and the volume of the evidence sought, they provide little basis for forgoing use of the Convention. On the other hand, particular foreign nations may have erected, formally or informally, more substantial barriers to successful use of the Convention. Resort to the Convention's procedures may be demonstrably more cumbersome in some countries than in others. Most significantly, some foreign nations may have chosen, as France has done, to make a reservation under Article 23 of the Convention, refusing to accept letters of request "issued for the purpose of obtaining pre-trial discovery of documents" (art. 23, 23 U.S.T. 2568).²⁴ Although petitioners contend (Pet. 17 n.36) that France's Article 23 reservation "was not intended to preclude United States litigants from obtaining necessary evidence abroad, but rather to prevent discovery of a 'fishing expedition' nature," we think that foreign litigants bear the burden of demonstrating that such reservations do not mean what they say. A foreign nation's insistence on retention of an absolute reservation under Article 23 necessarily raises serious ques-

force as its own courts can exercise in a pretrial evidentiary situation, numerous exceptions to the international obligation exist, which potentially bar this device from being executed at all. For example, foreign judicial cooperation may be withheld altogether if the discovery assistance is deemed prejudicial to state sovereignty.

Furthermore, even when discovery abroad is available, the *breadth* of evidence ordinarily expected from a full-fledged American-style deposition might be constricted for any number of reasons: the foreign state's own procedures might limit or foreclose cross-examination, full participation of counsel might not be allowed, or a verbatim record might not result, thus limiting admissibility of the testimony in an American court. The scope of foreign privilege might prove broader under the letter rogatory procedure than under either local law or American law, and in some cases, official translators might be required for each piece of paper involved.

²⁴ See 7 *Martindale-Hubbell Law Directory* (pt. VII) at 16 (1986); Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 *Int'l Law*, 35, 43-44 (1979).

tions about the likely effectiveness of discovery requests directed to it under the Convention.²⁵

In our view, the foreign litigant is best situated to inform the court of his country's procedures with respect to the Convention. He need not demonstrate that the Convention will function as effectively or as efficiently as the Federal Rules. But he must satisfy the court that, under the circumstances, resort to the Convention is consistent with the "just, speedy, and inexpensive" determination of the suit (Fed. R. Civ. P. 1). The district court should not require resort to the Convention unless it has reasonable prospects of producing effective and efficient discovery under the facts and circumstances of the particular case.

3. We believe that the trial court, with its expertise in discovery matters, is best situated to conduct the kind of particularized comity analysis that we have outlined, and that the case should be remanded for that purpose. Although we express no view on the proper outcome on remand, we believe that courts in general should give careful consideration to use of the Convention in appropriate cases. The Convention has major positive attributes—it provides a nonexclusive discovery mechanism that is free from foreign objections and it can yield evidence that is not otherwise obtainable. Although domestic litigants may complain that resort to the Convention will entail added expense and delay, a court can allay such concerns by careful supervision and wise exercise of its discretion. A court may require the foreign defendant, for example, to pledge his full cooperation with the Convention proceedings abroad. Under recent amendments to the Federal Rules, moreover, a district court generally must provide a timetable for discovery. See Fed. R. Civ. P. 16(b). Thus, a court might specify Convention procedures as an initial method for discovery, subject to reasonable time constraints. If those procedures fail to produce effective and efficient discovery, or lead to abusive

²⁵ We understand that Germany is now considering domestic regulations that would limit the scope of its Article 23 reservation.

practices, the court can return to traditional American discovery procedures and, if necessary, impose sanctions (see e.g., Fed. R. Civ. P. 11).²⁶

Quite apart from the Hague Evidence Convention, moreover, federal courts have substantial power to reduce international friction resulting from overly broad discovery requests. "There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus." *Herbert v. Lando*, 441 U.S. 153, 176 (1979). But Federal Rule 26(b) "emphasizes the complete control that the court has over the discovery process" (8 C. Wright & A. Miller, *Federal Practice and Procedure, Civil* § 2036, at 267 (1970) (footnote omitted)), and trial courts have broad authority to enter orders protecting both domestic and foreign litigants from discovery abuse. As this Court has stated (*Herbert*, 441 U.S. at 177):

[T]he requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

Moreover, because "pretrial depositions and interrogatories are not public components of a civil trial" (*Seattle*

²⁶ We strongly disagree with the court of appeals' suggestion that "the greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure" (Pet. App. 7a (quoting *Anschnetz*, 754 F.2d at 613)). We believe that a foreign court would welcome the opportunity to inform its American counterpart of the foreign perspective on discovery issues, even if the American court might ultimately disagree. Indeed, the Hague Convention provides a valuable means for domestic and foreign courts to engage in constructive discourse. That dialogue will provide the domestic and foreign courts with invaluable and authoritative insight into each others' laws.

Times, 467 U.S. at 33), litigants may have reasonable expectations that sensitive discovery materials will be shielded from public disclosure. See generally Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1 (1983).

Finally, we note that a United States court, in the exercise of comity, may wish to exercise a particularly active supervisory role in litigation involving foreign parties. Foreign litigants are accustomed to close judicial scrutiny of evidence-gathering in their own courts. See, e.g., Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985). Enhanced judicial participation in the discovery process will provide additional assurance to foreign litigants of the fairness of American judicial proceedings.

CONCLUSION

The court of appeals' decision should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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**In The
Supreme Court of the United States**

October Term, 1985

Societe Nationale Industrielle Aerospatiale and Societe De Construction
D'Avions De Tourisme,

Petitioners,

vs.

United States District Court
For The District of Iowa,

Respondent.

(Dennis Jones, John and Rosa George,
Real Parties in Interest)

*On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit*

**BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS ASSOCIA-
TION OF THE UNITED STATES, INC., PRODUCT LIABILITY AD-
VISORY COUNCIL, INC., AND VOLKSWAGEN AG AS AMICI
CURIAE IN SUPPORT OF PETITIONERS**

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No. 85-1695

**In The
Supreme Court of the United States**

October Term, 1985

Societe Nationale Industrielle Aerospatiale and Societe De Construction D'Avions De Tourisme,

Petitioners,

vs.

United States District Court
For The District of Iowa,

Respondent.

(Dennis Jones, John and Rosa George,
Real Parties in Interest)

*On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit*

**BRIEF FOR THE MOTOR VEHICLE MANUFACTURERS
ASSOCIATION OF THE UNITED STATES, INC., PRO-
DUCT LIABILITY ADVISORY COUNCIL, INC., AND
VOLKSWAGEN AG AS AMICI CURIAE
IN SUPPORT OF PETITIONERS**

INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of the *Amici Curiae* upon consent of the parties to this proceeding. The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") is a trade organization whose member companies build over ninety-nine percent of all motor vehicles produced in

the United States.¹ Its members also manufacture other products such as farm, industrial, lawn and garden tractors, agricultural equipment, construction and mining machinery, locomotives, railroad rolling stock, winches, turbines, and gasoline and diesel engines for industrial, maritime and agricultural uses.

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit membership corporation² whose principal purpose is to submit briefs, as friend of the court, in appellate cases involving significant issues affecting the law of products liability.

Volkswagen AG ("VWAG"), a motor vehicle manufacturer organized under the laws of the Federal Republic of Germany, is sometimes sued in United States federal and state courts as a defendant in products liability cases. Such claims frequently present pretrial discovery issues involving the appropriate role of the Hague Evidence Convention, international law and comity. *E.g.*, *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973); *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981). VWAG was the aggrieved party seeking relief in prior proceedings before this Court involving issues similar to those presented in the instant case. See *Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303 (1983) (stay of Michigan court's discovery orders granted), *appeal dismissed*, 465 U.S. 1014 (mem.), *reh. den.*, 104 S.Ct. 1932 (1984) (mem.).

¹MVMA members are: American Motors Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Mfg., Inc.; LTV Aerospace & Defense Co., AM General Division; M.A.N. Truck & Bus Corporation; Navistar International Corp.; PACCAR Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

²PLAC members are: American Honda Motor Company, Inc.; American Telephone & Telegraph; Automobile Importers of America, Inc.; Bell Helicopters Textron, Inc.; Black & Decker Company; The Budd Company; Clark Equipment Company; FMC Corporation; Fiat Auto U.S.A. and Ferrari, N.A.; The Firestone Tire & Rubber Company; Fruehauf Company; Great Dane Trailers, Inc.; International Playtex; Motor Vehicle Manufacturers Association of the United States, Inc.; Nissan Motor Corporation; Otis Elevator Co.; Porsche Cars North America, Inc.; Sturm, Ruger & Co.; Subaru of America, Inc.; and Toyota Motor Sales, U.S.A., Inc.

MVMA and PLAC members, their parent companies, subsidiaries and affiliates throughout the world, and all foreign corporations whose products reach the United States have a real and vital interest in the result reached in the decision below. That determination, reported at 782 F.2d 120 (8th Cir. 1986), held that a district court's *in personam* jurisdiction over a foreign litigant renders the Hague Evidence Convention³ inapplicable to the production of evidence located within the territory of a foreign signatory. Agreeing with the "analysis" of a Fifth Circuit decision,⁴ the Eighth Circuit panel stated, "[T]he Convention does not require deference to a foreign country's judicial sovereignty over documents, people and information . . ." 782 F.2d at 124.⁵

Although in some respects judicial "abrogation" of a solemn treaty commitment may be said to most directly offend the treaty signatories themselves, the impact also falls heavily upon the shoulders of companies such as *Amici's* members herein. These corporations manufacture, import and sell a wide variety of products which reach millions of users both here and abroad. They are subject to suit world-wide by numerous claimants seeking damages for some injury sustained during the use of a product or for some perceived disappointment or frustration in product performance.

Expansion of personal jurisdictional predicates such as "longarm" or "single act" theories in the United States means

³Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, *reprinted in* 28 U.S.C.A. §1781 note at 95 (West Supp. 1986) (hereinafter referred to as "Hague Evidence Convention" or the "Convention").

⁴*In re Anschuetz & Co.*, 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed sub nom. Anschuetz & Co. v. Mississippi River Bridge Authority*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98) (hereinafter referred to as "*Anschuetz*"). The Fifth Circuit, in turn, relied extensively upon *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984) (hereinafter referred to as "*Graco*").

⁵*In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.), *cert. granted sub nom. Societe Nationale Industrielle Aerospatiale v. United States District Court*, 54 U.S.L.W. 3809 (U.S. June 9, 1986) (No. 85-1695) (hereinafter referred to as "*Aerospatiale*").

that the Eighth Circuit's "jurisdictional" rationale for ousting otherwise clear treaty obligations, if allowed to continue, will surely result in recurrent clashes with foreign sovereigns. In the Convention cases which have eventually reached this Court,⁴ the governments of the insulted countries have vigorously and repeatedly made known their protests via diplomatic notes, *amicus* briefs and even direct communications to courts. Obviously, foreign justice and state ministries have quite enough to do without expending the time, energy and resources required to repeatedly intervene in private American litigation. What these messages amply demonstrate is that the eyes of the world are focused upon the solidity of treaty commitments and the predictability of their enforcement in the United States.

Since many MVMA and PLAC member companies are potential defendants abroad, the spectre of a world-wide "tit for tat" approach to increased "longarm" jurisdiction followed by unbridled discovery orders calling for production overseas of tons of documents, innumerable persons for deposition under foreign procedures and thousands of burdensome interrogatory answers is certainly not welcome. Yet, that threat is the potential end result when foreign sovereigns repeatedly see that American treaty commitments are easily bypassed via assertions of raw jurisdictional power. For obvious reasons, *Amici's* American companies have a vital stake in seeing to it that the integrity of international treaties is upheld.

Moreover, since some of *Amici's* member companies have parent, subsidiary or affiliate relationships with corporations organized and operating under foreign laws, there is a direct interest in seeing to it that such foreign companies are not exposed to American judicial sanctions which are imposed when they refuse to violate their national laws. Furthermore, since *Amici* member companies have substantial investments overseas, they

⁴*Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303 (1983), appeal dismissed, 465 U.S. 1014 (1984) (mem.), reh. den., 104 S.Ct. 1932 (1984) (mem.) (hereinafter referred to as "*Falzon*"); *Club Mediterranee, S.A. v. Dorin*, 105 S.Ct. 286 (1984) (appeal dismissed) (hereinafter referred to as "*Dorin*"); *Anschuetz*, supra n. 4; *Messerschmitt Bolkow Blohm, GmbH v. Walker, et al.*, 757 F.2d 729 (5th Cir. 1985), cert. granted, 106 S.Ct. 1633 (1986) (No. 85-99), cert. vacated (June 9, 1986); *Aerospatiale*, supra n.5.

have a broad and general interest in the protections afforded by treaties of all kinds. If the Hague Evidence Convention is not appropriately deferred to, what can we rightfully expect of foreign sovereigns when they experience discomfort or inconvenience in executing their obligations under other treaties?

In short, the issues presented in this proceeding transcend the interests of the litigants or sovereigns directly involved. What this Court decides about this dispute is likely to have profound influence upon lower courts, the world's business community at large, foreign governments, future efforts to promote international harmony and understanding through binding treaties and, most importantly, the rule of law.

SUMMARY OF ARGUMENT

The Hague Evidence Convention is a binding federal law constitutionally declared to be "supreme Law of the Land." Therefore, federal court decisions categorizing the treaty procedures as a form of foreign "obstruction" or "intervention" in American judicial proceedings reason incorrectly and create needless international conflict. The Convention is not only valid domestic law but also a binding international obligation to be adhered to under the core international law principle *pacta sunt servanda*. Absence of language of "exclusivity" in the treaty, required by the existence therein of numerous flexible options for obtaining evidence abroad, has been misconstrued by some federal courts as a basis for refusing to apply the Convention's procedures. "Exclusivity" is demonstrated to be a false legal issue. The real question is whether the treaty is *binding* where required—an issue that must be answered in the affirmative.

Some federal courts have also mistakenly held that the Convention does not apply to foreign parties over whom the court has personal jurisdiction thereby permitting American judicial compulsion requiring production in the United States of

evidence, persons and information located abroad without adherence to the treaty. This misinterpretation is completely at odds with the framers' intent and inconsistent with the treaty's drafting history which shows that it applies to both parties and nonparties. Moreover, the brute application of raw jurisdictional power over the foreign party litigant is shown to be improper because it does nothing to assuage the offense to a foreign state's judicial sovereignty. Such insults are avoided by applying the treaty.

Numerous principles of treaty construction should have led the federal courts to adhere to the Convention. For example, the two sources of federal law should have been harmonized and not pitted against each other; since the treaty is "later in time" than the involved federal rules, it should prevail if there is a conflict; under the principle of *lex specialis derogat generali* (a particular law prevails over a general rule), the Convention predominates as a federal law intended to address the specific problem of obtaining evidence abroad. Similarly, the treaty's "comprehensiveness"; the need for a liberal construction; the need to recognize a *quid pro quo* received by other signatories; the "rule of effectiveness"; and the interpretation placed on the treaty by the involved signatory states should lead to a finding that the treaty is applicable.

At this stage, fears of alleged delay and unfairness to domestic litigants are entirely speculative and premature. This Court is not called upon to answer every potential difficulty that may arise in the future. The treaty and the federal rules possess sufficient flexibility to assure that evidence is obtained or that justice in the individual case may be done. What is required is a clear and unequivocal ruling by this Court calling for use of the Convention. In this regard, proposals to have a "comity" or "balancing test" to preliminarily determine whether the treaty should be used in the first instance are shown to be both unnecessary and impractical. The treaty should be applied as the convenient and binding mechanism prescribed by both federal and international law.

ARGUMENT

I. THE HAGUE EVIDENCE CONVENTION IS BINDING AMERICAN LAW TO BE APPROPRIATELY APPLIED, REGARDLESS OF AN AMERICAN COURT'S *IN PERSONAM* JURISDICTION OVER THE FOREIGN NATIONAL, IF THE EVIDENCE IS LOCATED WITHIN THE TERRITORY OF A FOREIGN SIGNATORY WHOSE SOVEREIGNTY WOULD BE OFFENDED BY AMERICAN JUDICIAL COMPULSION CONFLICTING WITH THE TREATY.

A. The Convention Is Binding American Law. Therefore, Assertion Of A "Conflict" Between American and Foreign Law At Initial Stages Is A False Issue.

A recurrent theme runs through the Eighth Circuit decision below and the *Anschuetz* and *Graco* opinions upon which it heavily relies. This is the notion of an intractable "battle" or "conflict" between supposedly "regressive" forces of foreign law on the one hand and a "more enlightened" American law of discovery on the other. See e.g., *Anschuetz*, 754 F.2d at 613-14 ("The provisions under the Hague Convention and the actions of German authorities thereto are in patent conflict with the Federal Rules of Civil Procedure and the rights which these rules grant to all litigants, including this plaintiff.") The Hague Evidence Convention is portrayed as a foreign "obstructionist" element while the federal rules purportedly represent the American objectives of truth and justice.

Thus, for example, the court below depicts the Convention as an instrument of foreign sovereignty that operates to "needlessly delay and frustrate the discovery process." 782 F.2d at 125. The *Anschuetz* court reasons that application of the treaty gives foreign litigants "an extraordinary advantage" while limiting their American counterparts to "cumbersome procedures and narrow range." 754 F.2d at 606. Indeed, resort to the treaty "encourages the concealment of information" by foreign defendants. *Id.* at 607. According to the *Graco* opinion,

the Convention should not be honored as an "international agreement to protect foreign nationals from American discovery . . ." 101 F.R.D. at 519-20; *Accord, Anschuetz*, 754 F.2d at 611. These courts view the treaty as a potential source of "very serious interference with the jurisdiction of United States courts" and a means to make "foreign authorities the final arbiters of what evidence may be taken from their nationals" in American courts. *Anschuetz*, 754 F.2d at 612; *Graco*, 101 F.R.D. at 522. See also *Anschuetz*, 754 F.2d at 612 (disagreeing with decisions in other cases because treaty "would give foreign authorities this power over the conduct of litigation in American courts.")

The rationales suggesting a "conflict" between opposing forces of foreign and domestic law mistakenly hearken back to pre-treaty times. They raise false issues at this stage. This is because the Convention is *not* an embodiment of some threatening foreign law; it *is* binding *American* law! The treaty's deference to foreign judicial sovereignty does not diminish its status as *American* law. The Convention's respect for, or incorporation of, some foreign procedures does not make it any less obligatory as *United States* law. The treaty's requirements, which assuredly differ from American practices, are not *foreign* impositions upon domestic litigants. Nor are they a form of *foreign* interference with the power of American courts. They are simply another species of United States legal obligations. The foregoing premise is basically unquestionable. Treaties made under the authority of the United States are expressly declared to be "supreme Law of the Land." U.S. Const., Art. VI, cl.2.'

⁷*Aerospatiale*, *Anschuetz* and *Graco* dealt with the interplay between the Convention and the Federal Rules of Civil Procedure. E.g., *Anschuetz*, 754 F.2d at 615 (Convention has "no application at all" to party "subject to the jurisdiction of a district court pursuant to the Federal Rules"). However, since most products liability suits are filed in *state* courts, the federal rulings create a serious anomaly in the Convention's application. A valid treaty preempts conflicting state law. *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("state lines disappear"). A treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States." *Asakura v. Seattle*, 225 U.S. 332, 341 (1924). "[I]nternational agreements of the United

[Footnote continued on next page]

Thus, it is erroneous for these courts to project an international "conflict" stemming from the treaty's references to foreign law. If domestic litigants or courts have "chafed" somewhat over the Convention's different procedures, such discomfort is directly attributable to imposition by United States authorities of this more recent domestic law. As with all new laws which impose change, courts and litigants may have to revise their routine practices. Neither judicial second-guessing about the "wisdom" of the new domestic law nor judicial suspicions about its "fairness," however, authorize American courts to disregard the "supreme Law of the Land."

B. What Actually Creates An International Conflict Is An American Court's Failure To Apply The Treaty As The Courts Did Below.

The federal courts' refusal to apply a binding treaty because of perceived "unfairness" and "prejudice" to domestic litigants violates not only internal United States law but also international law. "Every international agreement in force is binding upon the parties to it and must be performed by them in good faith." Restatement, Tent. Final Draft §321 (1985). The underlying doctrine of *pacta sunt servanda* "is perhaps the most important principle of international law" and implies that "international obligations survive any restrictions in domestic law." *Id.* at Comment a. The treaty's promises must be kept; yet these courts have refused to do so.

It is not surprising that foreign government authorities have issued unequivocal statements objecting to a court's failure to faithfully apply the Convention in each of those cases which have reached this Court. The offense to foreign judicial sovereignty created by American judicial compulsion is

[Footnote continued from preceding page]

States are law of the United States and supreme over the law of the several States of the United States." Restatement of the Foreign Relations Law of the United States (Revised), Tent. Final Draft §131 (July 15, 1985) (hereinafter "Restatement, Tent. Final Draft.") The *Anschuetz* panel alluded to this difficulty when it suggested that contrary state court decisions might be explained away as resulting from a court that "felt more obliged to yield to the supremacy of a federal treaty over state laws." 754 F.2d at 608.

manifest. Even courts refusing "first resort" to the Convention as a matter of comity have recognized the nature of their international insult. See *Anschuetz*, 754 F.2d at 613; *Aerospatiale*, 782 F.2d at 125-26 ("the greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure") (emphasis supplied). This is equivalent to saying, "we should insult the foreign sovereign now so we will avoid heaping a greater insult upon the sovereign later." As the foreign states have repeatedly expressed, such an approach is unacceptable. Instead of applying the law to avoid international conflict, these federal courts have created one. It remains for this Court to restore adherence to the treaty as appropriate American law and to apply the core principle of *pacta sunt servanda* to effectuate binding international law.

C. The Question Of So-Called "Exclusivity" Of The Convention Is A False Issue. The Treaty Must Be Applied Although, By Its Terms, The Foreign Sovereign's Procedures Will Not Always Govern And Harmonization With Federal Discovery Rules May Be Required.

Unfortunately, disputes regarding application of the Convention in American courts have been dogged by wasteful debate over whether the treaty is the "exclusive" or "mandatory" means of obtaining evidence located abroad.⁸ Such focus upon language of "exclusivity," not clearly expressed in

⁸E.g., *Aerospatiale*, 782 F.2d at 124 (defendants contend that treaty "provides the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory"); *Anschuetz*, 754 F.2d at 606 and n.7 (Hague Convention "is not exclusive"); *Id.* at 615 ("unlike the Hague Service Convention, which expressly provides that it is exclusive, the Hague Evidence Convention contains no express provision for exclusivity"); *Id.* at 615 (Convention should not be elevated to status of "the exclusive method of conducting discovery abroad"); *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 123 Cal. App. 3d 840, 859, 176 Cal. Rptr. 874, 885-86 (1981) (Convention not "a preemptive and exclusive rule of international evidence gathering" but provides "a minimum measure of international cooperation").

the Convention itself, mistakenly elevates semantical considerations over substance. This Court should not get bogged down in the essentially semantic "exclusivity" debate. That simply is a false issue.

The question is not whether the treaty is *always* "exclusive" or "mandatory" under *any and all circumstances*. Plainly, it is not. To its credit, the treaty, by its own terms, provides the parties with some flexible options. For example, Article 27(b) provides that a state may permit "by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions." Similarly, Article 27(c) permits a state to allow, "by internal law or practice, methods of taking evidence other than those provided for in this Convention." Clearly, the "mandatory" nature of the letter of request requirement will depend upon the circumstances. To illustrate, the United States has "less restrictive" or alternate methods of taking evidence in this country which it allows foreign litigants to employ. 28 U.S.C. §1782(a),(b)(1966). Thus, the Convention is plainly not "exclusive" when foreign litigants pursue discovery in the United States. See 1 B.Ristau, *International Judicial Assistance (Civil and Commercial)* §5-40 at 255 (1984) (since United States has not made Convention exclusive method for securing evidence in its territory, Convention is "optional" in that respect). Because Article 27 permits contracting states to maintain or introduce in the future more liberal procedures, a rigid focus upon nonexistent language of "exclusivity" erroneously emphasizes the misnomer.

This is also obvious from other Convention provisions. Article 28, for example, reserves the right of a signatory state to ease its procedures in separate bilateral or multilateral agreements with other states. Thus, as a matter of technical draftsmanship, the more restrictive Convention procedures cannot be denominated "exclusive" or "mandatory." Similarly, Article 1 of the Convention provides that a state's judicial authority "may" request evidence to be obtained by means of a letter of request to the other state's competent authority. Use of the permissive word "may" is required because the Convention provides other flexible options to obtain evidence if the cir-

cumstances permit. For example, Chapter II of the Convention authorizes evidence to be taken, where appropriate, by diplomatic officers, consular agents and commissioners. Given the numerous options available to obtain evidence, it would have been poor draftsmanship to lace the treaty with mandatory words like "shall" or other language of "exclusivity." American courts critically probing the Convention for such language are engaging in a fruitless search in pursuit of a false issue.

The real question is not whether the Convention is "exclusive" or always "mandatory" but whether it is *binding* law when the circumstances are appropriate. A substantial body of scholarly commentary, employing powerful analytical insights, including review of the applicable language and history, convincingly demonstrates that it is binding law. For example, Bruno A. Ristau, former director of the Office of Foreign Litigation, U.S. Department of Justice, and United States representative to two Special Commissions convened by the Hague Conference on Private International Law to study and improve the implementation of the Hague Service and Evidence Conventions, states the following in his treatise, *International Judicial Assistance* [§5-40 at 255]:

"[T]he Convention expressly permits a member state to make a variety of exceptions and to impose conditions and limitations, which other member states must honor. In this sense the stipulations of the Convention - including the member states' declarations and exceptions - are 'mandatory' upon the United States and must be honored by federal and state courts.

"Where a state signifies that testimony can be secured in its territory for use in foreign proceedings *only* pursuant to the Evidence Convention, United States courts are bound by that declaration as a matter of federal treaty obligation, and the Convention is therefore 'mandatory' with respect to testimony sought by American litigants *in the territory of such state*. With respect to the taking of evidence in the territory of such state, United States federal and state procedural laws - as laws of the requesting state - have obviously been affected by the stipulations of the

Convention." (Emphasis in original).^{*}

D. The Court Below And The Decisions On Which It Relied Employed A Flawed Analysis As To The Intent And Applicability Of The Treaty.

1. The Treaty Applies When The Court Has Personal Jurisdiction Over The Foreign Party.

Aerospatiale, *Ansuetz* and *Graco* hold that the Hague Convention is inapplicable to discovery from a foreign party over whom the American court has personal jurisdiction. They limit operation of the treaty to willing nonparty witnesses who insist on testifying abroad or to unwilling nonparty witnesses against whom compulsion by the foreign sovereign is necessary. *Aerospatiale*, 782 F.2d at 125; *Ansuetz*, 754 F.2d at 611; *Graco*, 101 F.R.D. at 519-20. These courts hold, therefore, that a federal court's compulsory order to a foreign national to produce foreign-located documents, deposition witnesses and interrogatory answers in the United States does not violate the treaty. Acts abroad necessary to comply with an order requiring production in the United States, according to these courts, are merely "preparatory" and "do not constitute discovery in the foreign nation as addressed by the Hague Convention."

^{*}See also, Bishop, *Significant Issues in the Construction of the Hague Evidence Convention*, 1 Int'l Litigation Quarterly 1, 11-43 (1985) (publication of the International Litigation Committee of the ABA Section of Litigation); Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 Colum. J. of Trans. L. 231, 253-272 (1986); Radvan, *The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning Its Scope, Methods and Compulsion*, 16 N.Y.U. J. Int'l L. & Pol. 1031, 1035-37 (1984); Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 758-61 (1983) ("[T]he Convention should be the primary means of securing evidence located in the territories of other states party—if not by its terms, then by a proper understanding of its intent and customary international law"); Note, *Gathering Evidence Abroad: The Hague Evidence Convention Revisited*, 16 Law & Policy in Int'l Bus. 963, 990-1002 (1984); Comment, *The Hague Convention on The Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. Pa. L. Rev. 1461, 1475-85 (1984); Recent Development, *Extraterritorial Discovery*, 25 Va. J. Int'l L. 249, 267-80 (1984).

Anschuetz, 754 F.2d at 611; *Aerospatiale*, 782 F.2d at 124-25; *Graco*, 101 F.R.D. at 521.

The hypothesis that the Convention does not apply to parties over whom the court has jurisdiction is inconsistent with the Convention's history which indicates that the framers expected the treaty would cover *both* party and nonparty witnesses. See Note, *Gathering Evidence Abroad*, *supra*, 16 L. & Policy in Int'l Bus. at 1001-02. For example, an originally submitted draft of Article 1 contained the words, "to obtain evidence (including the taking of statements of witnesses, parties or experts and the production or examination of documents or other objects or property). . ." After various revisions, the parenthetical words were deemed unnecessary and were deleted. The finally adopted words "to obtain evidence" were explained to be "more explicit and even broader than the proposed phrase" quoted above. *Ibid.* Thus, evidence from "parties" abroad was clearly contemplated.¹⁰ A court's personal jurisdiction over a party has no bearing on the requirement to use Convention procedures. *Ibid.* See also, Sadoff, *The Hague Evidence Convention: Problems at Home of Obtaining Foreign Evidence*, 20 Int'l Law. 659, 667 (1986).

Moreover, the federal courts' doctrinal focus upon *raw jurisdictional power* is overemphasized. The mere fact that a court may have *power* to order an act to be done does not mean that the exercise of that brute power is proper, correct or even lawful. Indeed, one of the traditional functions of appellate courts is to police the legality of court orders. Phrased differently, the "existence of the power to order a thing done does not

¹⁰The Convention repeatedly uses the word "parties" to refer to *states* who are party to the Convention or other international agreements. *E.g.*, Articles 28, 29, 31, 32; see also Article 39 ("Party to the Statute of the International Court of Justice"). Thus, the Convention's general nonuse of the term "parties" to describe the litigants over whom a forum court has jurisdiction is understandable from the standpoint of practical draftsmanship. Similarly, it would have been uneconomical drafting to distinguish between "parties" and "nonparties" when both were intended in the phrase "to obtain evidence." It may be noted that the "letter of request" device known as "letters rogatory" (28 U.S.C. §1781), long "on the books" as a mechanism for obtaining evidence abroad, also does not distinguish between parties and nonparties.

resolve the question of the propriety of exercising that power, particularly in the international context." Oxman, *supra*, 37 U. Miami L. Rev. at 740. "The existence of rational and preferable alternatives should inform the decision in any case." *Id.* at 740-41. In the present context, the treaty procedures are those "rational and preferable alternatives." As Professor Oxman observes,

"The notion that jurisdiction to command appearance before the court 'domesticates' the witness or party for all purposes relevant to the litigation is fallacious. The court should not ignore the foreign nationality or locus of the witness or evidence." *Id.* at 741.

Close analysis reveals that the *Graco* court's rationale that "discovery takes place here" even if the necessary information is located abroad, 101 F.R.D. at 521, is based on that court's assumption that use of the Hague Convention's procedures would deprive the American forum court of control over the discovery process. *Id.* at 520-22. That fear is unfounded because the Convention is binding, domestic American law - not intrusive foreign law. The Convention is federal law designed to facilitate obtaining evidence in foreign countries not to control American proceedings.

Under accepted principles of international law, each state has sovereignty over all activities taking place within its territory. Accordingly, no state may perform an act in the territory of a foreign state without the latter's consent. Oxman, *supra*, 37 U. Miami L. Rev. at 749. In the case of extraterritorial discovery, that "consent" has been given by certain foreign sovereigns only in the Hague Evidence Convention. The "consent" given must be used in accordance with its terms.

The limits of raw jurisdictional power over the litigant may be viewed from still another perspective: the difference between the interests of the individual litigants and the sovereign nations involved. This was expressed in the *amicus curiae* brief of the United States Solicitor General in *Volkswagenwerk A.G. v. Falzon*, No. 82-1888, at p.7 n.3:

"The fact that a state court has personal jurisdiction over a party. . . does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction."

The approach of federal courts focusing exclusively upon notions of jurisdictional power fails to come to grips with the offense to foreign judicial sovereignty. The Convention is the mechanism by which such insult is avoided.

In short, the federal courts' rationale for dispensing with use of the Convention whenever foreign parties are subject to their jurisdiction is erroneous. It ignores the fact that the treaty is binding federal law, as are the Federal Rules. Minimally, the courts involved should have harmonized these two sources of federal law and not pitted them against each other.¹¹ "[A]n Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, Ch. J.). Or, as stated in Section 134 of the Restatement, Tent. Final Draft (1985), "Where fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States."

2. The Court Below Incorrectly Applied Principles Of Treaty Construction.

A number of major errors in the *Anschuetz* analysis and construction of treaty intent have already been discussed. Others abound. For example, United States treaties and federal statutes are said to be of equal authority, so that in case of inconsistency, the later in time should prevail. Restatement, Tent.

¹¹See 1 B. Ristau, *International Judicial Assistance* §5-40, at 255 and n.78, at 268.1 (federal and state procedural laws "have obviously been affected by the stipulations of the Convention"; it is "as if" Rule 28(b) "had been amended by adding a proviso . . .").

Final Draft, §135, Comment a (1985); *Cook v. United States*, 288 U.S. 102, 118-19 (1933). Promulgated in 1938, the federal discovery rules clearly predated ratification of the Convention. Rule 28(b) governing depositions abroad was last amended in 1963. Thus, in the event of a conflict between the two, the rule of construction would require the treaty to "prevail." The *Anschuetz* court, however, after acknowledging the "later in time" rule, refused to "make such an apparently arbitrary ruling" because the 1980 and 1983 amendments of the federal rules made no mention of the treaty. *Anschuetz*, 754 F.2d at 608 n.12. This flawed analysis is astounding since the 1980 and 1983 amendments have nothing to do with the substance of the discovery devices available nor do they conflict with the treaty. Because the treaty was obviously "later in time," the courts should have held the Convention to supersede.

Other analyses leading towards a finding of treaty applicability have been enumerated by the commentators. One principle of statutory construction and international conflict of law doctrine is *lex specialis derogat generali* (a particular law prevails over a general rule). The Hague Convention is a federal law designed to address the *specific* problems of obtaining evidence located in foreign countries. The federal rules, however, govern the more *general* field of discovering evidence for use in United States courts. Therefore, application of the *lex specialis* principle suggests that the Convention prevails on the subject of discovery abroad. Comment, *supra*, 132 U. Pa. L. Rev. at 1485.

Still another factor is the treaty's "comprehensiveness." The Convention is "comprehensive in its terms," providing for all available methods of taking evidence abroad, and is exhaustive in its treatment of these procedures. This comprehensiveness "strongly indicates that the parties expected that any request for evidence in another contracting nation would use one of the methods provided by . . . the Convention." Bishop, *supra*, 1 Int'l Lit. Q. at 25. Another factor is the treaty's permission to signatories to provide "less restrictive" means of taking evidence. "Such provisions make no sense unless the Convention was intended to be exclusive other than for the listed exceptions. This common sense reading of the treaty finds support in

the contract doctrine of *expressio unius est exclusio alterius*—if one or more matters are specifically listed, others are excluded.” *Id.* at 26.

Still another factor is the contractual setting in which the foreign signatories compromised their normal internal practices when adopting the treaty. If the Convention is not construed as binding, the civil law nations “received no meaningful quid pro quo for their concessions to the United States.” Oxman, *supra*, 37 U. Miami L. Rev. at 760.

“The civil law nations agreed under the convention to make the cooperative procedures for securing evidence in their territory more effective—even to the point of requiring their courts to use some common law practices alien to them. That agreement most probably was based on an expectation that the Convention procedures would be used and that their territorial sensitivities would be respected.” *Id.* at 760-61. See also, Comment, *supra*, 132 U. Pa. L. Rev. at 1482.

In ascertaining treaty intent, courts also favor a “liberal construction” of treaties where two interpretations, one restrictive and one expansive of treaty rights, are possible. *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933); see also *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928) (“narrow and restricted” construction of federal treaty must be rejected in favor of construction “enlarging” rights conferred). The Convention’s comprehensive scheme for obtaining evidence and its preservation of carefully tailored restraints protecting state judicial sovereignty calls for a “liberal” construction which avoids violations of judicial sovereignty and which implements treaty performance in a spirit of *uberrima fides* (most scrupulous good faith). Bishop, *supra*, 1 Int’l Lit. Q. at 37-38. Closely related is the principle of interpretation called the “rule of effectiveness.” This means that “treaties have a purpose, should be construed to be effective in achieving that purpose, and should not be rendered a nullity.” *Id.* at 39. If the Convention were held inapplicable whenever the court has jurisdiction over a party, the Convention would be “robbed of any significance” with respect

to discovery from foreign parties thereby rendering the treaty a “nullity” in the most frequent of situations. *Ibid.*

Courts also look to the interpretation placed upon the treaty by the governmental agencies responsible for its negotiation and enforcement, *Sumimoto Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982), as well as the interpretation placed on the treaty by the other signatory nations. *Air France v. Saks*, 470 U.S. —, —, 105 S.Ct. 1338, 1345 (1985) (“we find the opinions of our sister signatories to be entitled to considerable weight”). The Government authorities of Germany, France and the United Kingdom have repeatedly and unequivocally asserted via diplomatic notes, *amicus* briefs and correspondence to courts that the Convention procedures are binding and must be followed. While the expressed position of the United States has been somewhat conflicting and inconsistent, in no case has the United States endorsed the view that the Convention never applies to parties over whom American courts have jurisdiction. On the contrary, the United States view has either amounted to expression of support for foreign state protests¹² or outright adherence to the Convention’s procedures¹³ or to suggestions that deference to the Convention is desirable “in appropriate cases” for reasons of “comity” in order to avoid “international friction arising from the enforcement of extraterritorial discovery orders.”¹⁴

¹²E.g. *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 33 Cal. App. 3d 503, 505-06, 109 Cal. Rptr. 219, 221-22 (1973) (pre-Convention case; German aide-memoire to superior court accompanied by U.S. State Department letter “expressing its support for the position taken by the German Embassy” and offering “its services in transmitting letters rogatory to the German authorities as provided by federal law”).

¹³E.g., Solicitor General’s *Amicus Curiae* Brief in *Falzon*, at pp. 5-6 (Convention “deals comprehensively” with methods to obtain evidence abroad; the treaty signatories “contemplated that proceedings not authorized by the Convention would not be permitted”; the treaty “must be interpreted to preclude an evidence taking proceeding” in foreign country “if the Convention does not authorize it and the host country does not otherwise permit it”).

¹⁴E.g., Solicitor General’s *Amicus Curiae* Brief in *Dorin* at pp. 9 n.10, 13; Solicitor General’s *Amicus Curiae* Brief in *Anschuetz and Messerschmitt*, at pp. 8, 11 (American courts “should utilize” the Convention procedures and “refrain, when feasible, from ordering a party to perform acts that would violate the laws or clearly articulated policies of a foreign government”).

Whereas the focus of German, French and United Kingdom assertions has been upon adherence to the treaty as binding, the United States' somewhat inconsistent progression of statements has only recently culminated in a view that the Convention is not "exclusive." As demonstrated earlier at p. 11, *supra*, technical non-"exclusivity" of the treaty is but a statement of the obvious. The United States, however, does coincide with its sister signatories in the major objective that offenses to foreign judicial sovereignty should be avoided and concurs that the Hague Convention's procedures are a useful mechanism to achieve this objective. In light of the agreement of all government authorities as to the essential desirability of utilizing Convention procedures even when parties are subject to American court jurisdiction, the contrary interpretation of the *Aerospatiale*, *Anschuetz* and *Graco* federal courts should be rejected by this Court in favor of a harmonious result that is commensurate with the sanctity of treaties and the core principle of *pacta sunt servanda*.

3. Fears of Alleged Delay And Unfairness To Domestic Litigants Are Entirely Speculative And Premature.

The courts below expressed fears that American litigants would be delayed and frustrated in discovery if forced to use Convention procedures. However, as indicated above, the treaty is binding *American* as well as international law. Any purported inconvenience to litigants has been imposed by the force of United States authorities. The personal disapproval by several judges of some of the treaty's terms is legally irrelevant. The alleged prospect of some delay or restrictions is, therefore, a false legal issue. The fears expressed in *Aerospatiale*, *Anschuetz* and *Graco*, in any event, are decidedly anticipatory, premature and speculative. In none of these cases was resort to the Hague Convention procedures permitted. There was no factual basis to support the fears expressed. Such speculation is far too slender a reed upon which to base a treaty violation or an insult to foreign sovereigns.

4. The Treaty Complements The Federal Discovery Rules. What Is Involved Is Harmonization Of The Two.

Since the treaty and the federal discovery rules are both sources of federal law, they should be construed to avoid conflict. Restatement, Tent. Final Draft §134 (1985). That should not be difficult since the systems are essentially complementary.

"The Convention permits all discovery devices provided for in the Federal Rules. Indeed, it is through the Convention that, for the first time, U.S.-style discovery abroad has been made possible and, more importantly, become a contractual obligation of other Contracting States. Thus, the Hague Evidence Convention does not invalidate, repeal, or supersede the Federal Rules or, for that matter, the state law equivalents of the Federal Rules. Rather, the Convention complements these rules with respect to the special situation of taking discovery in other Contracting States." Heck, *supra*, 24 Colum. J. Trans. L. at 256-57; See also *Id.* at 257-78; 1 B. Ristau, International Judicial Assistance §5-40, at 255 and n.78, at 268.1.

What is needed is an unequivocal commitment by American courts to apply both sources of *American* law in a reasonable fashion and to reasonably harmonize procedures so that possible difficulties in individual cases are resolved.

At this stage, however, neither this Court nor the courts below are called upon to answer every potential difficulty that may arise in the future. Both the treaty and the Federal Rules possess sufficient flexibility to assure that evidence is either appropriately obtained or that justice in the individual case may be done. Foreign government authorities have expressed a willingness to cooperate in expediting reasonable requests in accordance with Convention procedures and even to consider modifying their internal practices or their restrictive reservations under the Convention. In its *amicus curiae* brief in *Anschuetz* and *Messerschmitt*, the Federal Republic of Germany observed, at p. 10, that of the 151 Convention requests addressed to German courts since Germany ratified the treaty, "131 of these requests were accepted and executed. Most of the remaining 20 requests were rejected because the evidence to be taken was not suffi-

ciently identified or the request was for the production of documents under pretrial discovery." The German government also announced its consideration of "regulations to permit the granting of certain of these requests [for the production of documents]." The *Anschuetz* ruling, however, "hinders this development" since the contemplated regulations "would be futile." *Ibid.*

As binding federal law, the treaty should be given an opportunity to effectuate its salutary purposes. If it proves unsuccessful in the long run, the United States Government has sufficient means under the treaty and international law to assert changes or remedies. For example, Article 36 of the Convention provides that, "Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels." Additional flexibility exists to negotiate and implement changes to resolve difficulties under Article 27, which allows member states to permit different or "less restrictive" methods of taking evidence and conditions. Similarly, Article 28 allows agreements between two or more signatories "to derogate from" various Convention procedures. Obviously, therefore, if the treaty proves unsatisfactory from the United States point of view, sufficient channels exist for negotiating and implementing improvements. Finally, Article 41 allows "denunciation" of the treaty after the applicable period if that course were later found to be warranted. In short, there is little excuse for not undertaking a *good faith* effort to effectuate the "supreme Law of the Land" and international law. Restatement, Tent. Final Draft §321 (1985).

II. SINCE THE CONVENTION IS BINDING FEDERAL LAW, GENERAL COMITY PRINCIPLES TECHNICALLY ARE NOT REQUIRED AT THIS STAGE BUT MIGHT PROVE HELPFUL TO RESOLVE LATER CONFLICTS.

Because the Convention is binding federal and international law, adherence to its procedures is required. A "comity" approach to determine whether resort to the Convention is "desirable" in the first instance is unnecessary.¹³ However, since the federal courts involved here thus far refused to apply the Convention procedures, no one can predict with certainty whether and, to what extent, harmonization of potential conflicts might be necessary *after* a pattern of full treaty use has emerged. It is conceivable that problems in implementation of court orders on both sides might arise, for example, in the area of "privileges" where, under Article 11, the privileges accorded by different sovereigns might be invoked. In such a later stage situation, principles of "comity" may truly prove helpful in avoiding international friction via "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

In his March 1986 *amicus curiae* brief in *Anschuetz* and *Messerschmitt*, however, the Solicitor General suggested a "comity" analysis to determine whether resort to Convention procedures is warranted in the first instance. Brief, at pp. 11-12. According to this view, which is contrary to the firm position taken by the Solicitor General in the *Falzon* case, "the comity inquiry depends on the circumstances of each individual case." *Id.* at 12. The Solicitor General suggests that the Restatement

¹³In the absence of a definitive ruling by this Court and in the face of perceived conflicts, notions of "comity" have assisted some state courts in exercising judicial restraint or in requiring so-called "first resort" to Convention procedures. *E.g.*, *Gbr. Eickhoff Maschinefabrik Und Eisengieberei v. Starcher*, 328 S.E.2d 492 (W. Va. 1985). This approach is far preferable to the approach of federal courts rejecting treaty application.

(Second) of Foreign Relations Law of the United States §40 (1965) sets forth some of the relevant considerations. *Ibid.*

The Solicitor General's suggestion of a "comity" approach and "balancing tests" to be applied on an *ad hoc*, case-by-case basis appears to stem from Departments of Justice and State concerns about extraterritorial enforcement of United States regulatory laws. See Dam, *Economic and Political Aspects of Extraterritoriality*, 19 Int'l Law. 887, 895 (1985):

"Within the U.S. Government, a consensus now exists that in deciding whether or how to act, we should weigh conflicting interests, laws or policies of foreign jurisdictions. The United States has a long-term national interest in following this comity approach."

See also, Kestenbaum & Olson, *Federal Amicus Intervention in Private Antitrust Litigation Raising Issues of Extraterritoriality: A Modest Proposal*, 16 Int'l Law. 587 (1982); Waller & Simon, *Analyzing Claims of Sovereignty in International Economic Disputes*, 7 Nw. J. Int'l L. & Bus. 1 (1985).

Whatever may be the objectives of United States agencies in enforcing American regulatory or substantive law extraterritorially, however, such goals are entirely absent when considering the use of *procedural* devices already adopted as domestic federal law. The process by which substantive law is attempted to be applied to acts abroad involves careful United States government consideration of political trade-offs between regulatory principles and foreign policy concerns. This is forcefully described in former Solicitor General, now Judge Robert H. Bork's 1982 article. "We routinely seek to balance our enforcement interests with the interests other nations may have with respect to the conduct in question." Bork, *International Antitrust - Introduction*, 18 Stan. J. Int'l L. 241, 241-43 (1982) (quoting statement of Assistant Attorney General William Baxter before House Subcommittee). However, no such political and governmental balancing is involved in a private litigant's suit:

"But no such process occurs when a private suit goes forward. The balancing process. . . must be performed initially by a district court, if indeed it is performed at all. . . .

"The district court is then placed in a very peculiar position. Unless the judge adopts an extreme position - either that the interests of the foreign government are no concern of his or that any such interest is reason to dismiss the complaint - he is forced into a largely political and managerial role that is usually, and ideally, played by the executive or the legislative branch and eschewed by the judiciary." *Ibid.* (Quoted in Oxman, *supra*, 37 U. Miami L. Rev. at 786-87 n.144)

In purely private litigation such as product liability cases, the objectives of Government agencies to "balance" regulatory and foreign policy concerns are not truly present. As Professor Oxman has observed,

"With respect to ordinary common law civil actions, neither an existing federal policy nor direct involvement by the Department of Justice in the litigation is available as a political basis for a decision that could offend a foreign state. Under the United States Constitution, American state and federal courts must respect the Hague Evidence Convention." Oxman, *supra*, 37 U. Miami L. Rev. at 787.

Practical considerations lead to the same conclusion. The treaty is binding international and federal law to be applied by its terms when appropriate. It is a definitive guide on how to proceed in a manner surely acceptable to the other states. A vague and imprecise "balancing test," however, will inevitably yield unpredictable, conflicting decisions from state to state and even from court to court within the same state.¹⁴ With multiple

¹⁴ Compare *Graco*, 101 F.R.D. 503 (N.D.Ill. 1984) with *Schroeder v. Lufthansa German Airlines*, 18 Av.Cas. (CCH) 17,222 (N.D.Ill.1983); Compare *Lasky v. Continental Prods. Corp.*, 569 F.Supp. 1227 (E.D.Pa. 1983) with *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D.Pa. 1983). The potpourri of Hague Convention decisions already extant which utilize different approaches and rationales is further illustrative. See Castillo, *The Hague Evidence Convention: Foreign Parties Must Provide Broad Discovery in U.S. Litigation*, Fla. Bar J. 43 (Aug. 1986) (collecting cases); Note, *Hague Evidence Convention: A Practical Guide To The Convention*, 16 Ga. J. Int'l & Comp. L. 73 (1986) (with jurisdictional digest of cases).

state court systems in 50 states, as well as innumerable potential conflicts among the federal judiciary, the predictability and uniformity of approach necessary in this area would be impossible to achieve. The ministries of foreign nations cannot practicably be expected to file diplomatic protests or *amicus* briefs in each and every private lawsuit involving some extraterritorial discovery demands. Furthermore, because of frequent appeals in this area, mandamus petitions and other related proceedings, the result would be chaotic. Trial judges would repeatedly have to weigh political considerations with which they are unfamiliar or which the litigants do not satisfactorily call to their attention and appellate courts would be required to repeatedly review the adequacy of the "balancing" process. Unbridled discretion regarding political questions about foreign sovereignty, foreign laws and foreign state interests should not be left to all judges in all federal and state actions all the time. Offenses to foreign judicial sovereignty must predictably be avoided. The Solicitor General's suggested "comity" approach is, in reality, a discretionary license for some courts to disregard a binding federal and international law and to rule in a manner that leads to international friction.

One need look no further than the *Anschuetz* case itself to illustrate the point. Few would objectively regard the Fifth Circuit's opinion as a true "balancing" of all relevant "comity" interests. Indeed, the Solicitor General's March 1986 *amicus* brief in *Anschuetz* concedes, in a mammoth understatement, that "the court's comity discussion was rather cursory. . ." Brief, at p.13. There simply is no need for a vague, *ad hoc* and imprecise "balancing" approach in lieu of the uniform, predictable approach offered by the Convention - which the foreign sovereigns have committed themselves to support. A definitive, predictable and stable rule clearly calling for use of the Convention would eliminate debate about misleading labels such as "exclusivity," "first resort" or "comity." Because of the potential for confusion, this Court should declare the treaty to be part of the fabric of American law in preference to an imprecise "balancing" approach.

CONCLUSION

The decision of the court of appeals should be reversed.

Dated: New York, New York
August 21, 1986

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISME,
Petitioners
v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN and ROSA GEORGE,
REAL PARTIES IN INTEREST)

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

**BRIEF OF GOVERNMENT OF SWITZERLAND
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

The Government of Switzerland will address the following questions:

Whether the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is applicable to the discovery of evidence located abroad from a party over whom a U.S. court has personal jurisdiction; and

Whether a U.S. court acts in conformity with international law if it unilaterally compels production of evidence located in a member State of the Convention in violation of that State's sovereignty.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1695

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISME,
Petitioners

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN and ROSA GEORGE,
REAL PARTIES IN INTEREST)

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF GOVERNMENT OF SWITZERLAND
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 36 of the Rules of this Court, the Government of Switzerland respectfully submits this brief as *amicus curiae* to urge reversal of the judgment below. Both petitioners and respondent have consented to the submission of this brief, and the written consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

Switzerland is a member of the Hague Conference on Private International Law and actively participated in the negotiation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (the "Convention"). The Government of Switzerland signed the Convention on May 21, 1985, and is now in the process of seeking ratification by the Swiss Parliament.¹ Although the Government of Switzerland has no direct interest in the outcome of this litigation, it believes that the decision of the Court in this case will have a significant effect on the application of the Convention in future cases, some which may involve the collection of evidence from Switzerland. The disposition of this case may influence the decision of the Swiss Parliament on whether to ratify the Convention.

The Government of Switzerland believes that the decision of the Court of Appeals must be reversed to prevent violations of international law and intrusions into the sovereignty of foreign nations, as well as to preserve the Convention as an essential link between the common law and civil law countries. This brief sets forth the views of the Government of Switzerland on the potential effects of this case on the legal interaction between Switzerland and the United States.

SUMMARY OF ARGUMENT

As the economies of nations have become more interdependent, effective mechanisms for cooperation between their different legal systems have become increasingly important. These mechanisms for cooperation (including

¹ Until the Convention is ratified by the Swiss Parliament, Switzerland is continuing its practice of providing evidence for use in civil proceedings in the United States through letters rogatory.

treaties, statutes, and administrative arrangements) facilitate international business by enhancing the predictability and enforceability of rules governing transactions across international boundaries.

Transnational enforcement of legal rules can most effectively be achieved when the sovereignty of all nations is respected. Such respect requires that conflicts between the legal requirements of nations be avoided or minimized whenever possible.

Pre-trial discovery is one area in which intergovernmental cooperation is necessary. In Switzerland, as in many civil law countries, the collection of evidence for use in civil proceedings is regarded as the exclusive function of the domestic judiciary. Because common law countries, such as the United States, permit the taking of evidence without participation of the judiciary, use of the Convention is especially important when a U.S. litigant seeks evidence from a civil law country. If a U.S. court unilaterally attempts to coerce the production of evidence located in Switzerland, without requesting governmental assistance, the U.S. court intrudes upon the judicial sovereignty of Switzerland. Use of the Convention will satisfy the requirements of both nations by providing the needed evidence to the U.S. litigant through a procedure consistent with Swiss law and sovereignty.

Contrary to the opinion of the lower court, the Convention plainly applies to the discovery of all evidence located in a contracting state, even if a U.S. court has personal jurisdiction over the party from whom the evidence is sought. To conclude otherwise would deprive the Convention of one of its essential purposes. Furthermore, the lower court's theory that discovery takes place only in the country requesting the evidence, and not at all in the country where the evidence is located, is irreconcilable with the concept of territorial jurisdiction and has no basis in international law.

The United States is a party to the Convention, which is a valid treaty, and is required by international law to comply with its terms. U.S. litigants and courts should not be given the option of ignoring the Convention in their own discretion. Rather, use of the Convention should be mandated in all cases in which evidence is sought from abroad.

ARGUMENT

THE COURT SHOULD REQUIRE USE OF THE HAGUE EVIDENCE CONVENTION TO OBTAIN EVIDENCE FROM ABROAD

A. The Convention, Like Other Judicial Assistance Mechanisms, Serves an Important Role in Facilitating International Commerce

Specifically, this case involves the use of U.S. discovery rules, rather than the Convention, to collect evidence in France for use in a U.S. civil proceeding, and the effect of such a procedure upon French sovereignty. The Government of Switzerland believes, however, that the Court's decision will have far-reaching effects on the use of the Convention to obtain evidence from other countries, including Switzerland, and also on other mechanisms for judicial assistance, such as those used for the collection of evidence in criminal investigations. Therefore, the Government of Switzerland submits that the Court should view the Convention in the broader context of international judicial assistance and the function such assistance serves in the international community.

In recent years, the economies of nations have become increasingly interdependent. More often than ever before, the viability of the plans of the government and business sectors in one nation depends upon the availability of rational and predictable legal rules and procedures in other nations.

Consequently, the existence of effective mechanisms for judicial assistance across national boundaries has important benefits for all countries. These mechanisms facilitate the execution of contracts, the enforcement of judgments, the implementation of regulatory systems, and the prevention and punishment of crimes. Without these international mechanisms, the commercial and social goals of many nations, including the United States and Switzerland, would suffer greatly.

The important role served by judicial assistance mechanisms in permitting differing national legal systems to coexist in an interdependent world is well illustrated by the relationship between Switzerland and the United States. On occasion, in the tremendous volume of business transactions between the two countries, situations arise in which there is confusion over which country should regulate certain activities. In these situations, both nations can justifiably assert jurisdiction over the same persons and conduct.

Nonetheless, Switzerland and the United States have a long and successful history of cooperation in resolving legal disputes. This pattern of friendly cooperation has produced significant benefits in such areas as crime control²

² In 1973, the United States and Switzerland entered into the Treaty on Mutual Assistance in Criminal Matters, 27 U.S.T. 2019, T.I.A.S. No. 8302. This Treaty, which entered into force in 1977, allows authorities of each nation, by making a written request on the other, to obtain documents, information, and other assistance in investigating a wide variety of crimes. The Treaty, when applicable, overrides Swiss laws that would otherwise prohibit disclosure of information to foreign parties. Since the Treaty came into effect, the Government of Switzerland has granted virtually all of the hundreds of requests made by the United States. The Treaty, which for the United States was the first of its kind, has served as a model for subsequent U.S. treaties on judicial assistance with other countries. See Senate Comm. on Foreign Relations, Treaty on Mutual Assistance with the Kingdom of the Netherlands, S. Exec. Rep. No. 36, 97th Cong., 1st Sess. 2 (1981); cf. Treaty Between

and securities law,³ as well as the collection of evidence for use in civil cases.⁴ The Government of Switzerland

the United States and Canada on Mutual Legal Assistance in Criminal Matters, March 18, 1985 (not yet entered into force).

In 1981, Switzerland enacted the Federal Act on International Mutual Assistance in Criminal Matters ("IMAC"), *translation reprinted in* Am. Bar Ass'n Nat'l Inst., *Transnational Litigation: Practical Approaches to Conflicts and Accommodations* 492-532 (1984) ("Transnational Litigation"). Under this domestic law, all foreign governments, including the United States, can request assistance in various matters relating to law enforcement. For example, IMAC includes provisions under which the Government of Switzerland may provide foreign governments with documents held by persons within Switzerland. Like the Treaty, IMAC takes precedence over Swiss privacy laws. IMAC, in addition, covers certain areas of investigation not covered by the Treaty. *See generally* Frei, "Swiss Secrecy Laws And Obtaining Evidence from Switzerland" in *Transnational Litigation* at 1-38.

³ In the early 1980s, problems arose in connection with investigations of securities law violations by the U.S. Securities and Exchange Commission ("SEC") because "insider trading, as such, is not a crime in Switzerland and therefore not covered by the Treaty. Discussions between the governments led to the creation of the Memorandum of Understanding Between Switzerland and the United States to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading, *reprinted in* 22 Int'l Legal Materials 1-7 (1983), which operates in conjunction with a private convention among Swiss banks, Agreement XVI of the Swiss Bankers' Association, *reprinted in* 22 Int'l Legal Materials 7-12 (1983). Under this arrangement, which was concluded in 1982, a combination of governmental and banking industry procedures enable the SEC to obtain information about transactions involving possible insider trading through Swiss banks. This arrangement is viewed as a temporary measure that will become obsolete when the Swiss Parliament enacts new legislation that will have the effect of making pertinent information available under the Treaty. *See* Frei, *supra* note 2, at 23-25.

⁴ Under current Swiss law, parties seeking evidence located within Switzerland for use in civil proceedings must request that evidence through use of the letters rogatory procedure. The Government of Switzerland has been extremely liberal in granting assistance in

views its signing of the Convention as but the latest in this series of efforts to provide a reliable legal framework for the conduct and regulation of transnational business.

In general, in approaching problems arising out of conflicts of jurisdiction, the Government of Switzerland proceeds on the following principles: (1) that a means should be found for achieving enforcement of reasonable legal rules across international boundaries, (2) that the sovereignty of nations should be recognized and protected, (3) that conflicts between the legal requirements of nations should be avoided whenever possible, and minimized when they cannot be avoided, and (4) that intergovernmental channels of assistance should be employed to the greatest extent possible to avoid such disputes. When civil litigants in the United States need evidence from other member states of the Convention, the Convention constitutes the intergovernmental channel of assistance that will provide the needed evidence while avoiding a conflict of jurisdiction.

Unfortunately, the Court of Appeals in this case has chosen a course of action that maximizes, rather than minimizes, conflicts between national legal systems. In ruling that the Convention is inapplicable when a U.S. court has jurisdiction over a litigant, even though the needed evidence is located exclusively in a foreign country, the lower court has revoked the commitments of the United States under the Convention and violated international law. The Government of Switzerland believes that this ruling does not benefit the long-term interests of the United States and the international community.

such cases; in recent years, about twenty requests per year have been received from the United States, and all have been executed. The Government of Switzerland expects to continue this liberal policy after Switzerland joins the Convention.

B. An Attempt by a U.S. Court to Compel Unilaterally the Taking of Evidence in Switzerland, Similar to the Demand for Evidence from France Made in This Case, Would Violate Swiss Sovereignty

If the decision of the lower court is upheld, it is likely that in future cases U.S. litigants seeking evidence located in Switzerland will ignore intergovernmental channels of assistance, such as letters rogatory and the Convention, and will rely instead on the domestic discovery procedures in the Federal Rules of Civil Procedure. In that event, the incidence of destructive—and unnecessary—conflicts of jurisdiction between Switzerland and the United States is likely to increase significantly.

Switzerland, as many other civil law countries, exercises more control over the collection of evidence for use in court proceedings than does the United States. Switzerland subscribes to the typical civil law view that the taking of evidence is essentially a domestic judicial function; when evidence is taken by a foreign authority without the participation or consent of the host country, the sovereignty of the host country is considered to have been violated. See Report of the United States Delegation to Eleventh Session of the Hague Conference on Private International Law, *reprinted in* 8 Int'l Legal Materials 785, 806 (1969); Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp. L.Q. 646, 647 (1964).

Under this fundamental principle of the civil law, which derives from the doctrine of territorial jurisdiction in international law, only the state in which the requested evidence is located has the authority to enforce and execute the gathering of that evidence. If a U.S. court orders a party to produce evidence from Switzerland, and backs that order with its coercive powers, the U.S. court, in effect, substitutes its own authority for that of the competent Swiss court, and therefore violates Swiss sovereignty and international law.

This violation of sovereignty is compounded when, as is sometimes the case, Swiss law specifically prohibits release of the information.⁵ In that situation, the U.S. court not only substitutes its own authority for that of the Swiss judicial system, but also compels the litigant to violate Swiss law.

Judicial sovereignty is not a vague or theoretical concept in Switzerland. For many years, the Swiss Penal Code has made it a crime for any person to take evidence on Swiss territory for use in foreign court proceedings.⁶ This law has been enforced against American attorneys who came to Switzerland to gather information for trial.⁷

In addition, on occasion the Government of Switzerland has been required to take special measures to protect its judicial sovereignty. For example, in 1983, a Swiss corporation under investigation for alleged tax fraud was served with a U.S. subpoena requiring production of documents located in Switzerland. Although an intergovernmental channel of assistance was available for obtaining

⁵ For example, Article 273 of the Swiss Penal Code prohibits persons in Switzerland from releasing confidential business information relating to third parties within Switzerland to foreign governments.

⁶ The relevant provision, Article 271, provides as follows in translation:

"Acting without Authorization for a Foreign State."

"1. Anyone who, without authorization, takes in Switzerland for a foreign state any action which is within the powers of the public authorities,

"Anyone who takes such actions for a foreign party or for any other foreign organization,

"Anyone who facilitates such actions,

"Shall be punished with imprisonment, in serious cases with penitentiary confinement."

⁷ See Frei, *supra* note 2, at 14-15.

the documents through the Government of Switzerland,⁸ the U.S. Government prosecutors insisted on using unilateral coercion.⁹ When the Swiss corporation indicated it would comply with the subpoena,¹⁰ the Government of Switzerland confiscated the documents, which it held until the U.S. prosecutors requested the documents through the available intergovernmental mechanism. All of the documents were then released to the U.S. authorities.

The above examples are isolated instances of conflict in an otherwise cordial and fruitful relationship. They serve to illustrate, however, that Switzerland, like the United States, has legal procedures which cannot be altered or suspended on an ad hoc basis. The Government of Switzerland, as well as those within its borders, may act only in accordance with Swiss law and through procedures consistent with that law.

Swiss judicial sovereignty, and the laws that protect it, should not be viewed as "blocking statutes" designed to frustrate United States discovery procedures.¹¹ Rather, they are a reflection of a national political tradition that places great value on the sovereign independence of the nation and the individual autonomy of its citizens.

The Government of Switzerland subscribes to the original intent of the negotiators of the Convention—an intent shared by the United States negotiators—that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable'

⁸ The documents were available to the U.S. Government under the Swiss Federal Act on International Mutual Assistance in Criminal Matters. See note 2 *supra*.

⁹ See *Marc Rich & Co., A.G. v. United States*, 736 F.2d 864 (2d Cir. 1984).

¹⁰ The court had imposed a penalty of \$50,000 per day on the company to coerce compliance. *Id.*

¹¹ Articles 271 and 273 of the Swiss Penal Code, discussed in notes 4 and 5 *supra*, were enacted in 1937.

in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." Message of the President of the United States Transmitting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. A, 92d Cong., 2d Sess. 11 (1972). If evidence is requested through the intergovernmental procedures of the Convention, the procedure is "tolerable" in Switzerland because the evidence will be collected under the auspices of the Swiss judiciary. Consequently, in situations where the Convention is applicable to evidence in Switzerland, its use will benefit U.S. interests by providing the needed evidence, and protect Swiss interests by avoiding intrusions upon Swiss sovereignty.

In this regard, the Government of Switzerland affirms its intent to construe the provisions of the Convention liberally in providing judicial assistance to the United States and the other member nations of the Convention.

C. The Convention Applies to the Production of Evidence by Parties Subject to U.S. Jurisdiction

The Court of Appeals has held that the Convention does not apply at all to the production of evidence abroad by a litigant when a U.S. court has personal jurisdiction over the litigant. This holding was not limited to discovery of evidence in France, but rather will be applied to the collection of evidence from all countries, including Switzerland, if not reversed by this Court. In the view of the Government of Switzerland, the interpretation by the lower court of the Convention is completely contrary to its plain meaning and intent, as there is no suggestion in the Convention itself, or its history, that the contracting states intended the Convention to apply only to situations in which the state requesting assistance lacks personal jurisdiction.

Indeed, as discussed above, the main purpose of the Convention is to provide a bridge between national legal

systems that permits the production of needed evidence while eliminating intrusions of sovereignty. A violation of Swiss sovereignty is in no way mitigated when a U.S. court has personal jurisdiction over the party coerced to take actions within Switzerland. Therefore, in holding that the Convention does not apply when a U.S. court has personal jurisdiction, the Court of Appeals has deprived the Convention of one of its essential functions.

In addition, the Government of Switzerland rejects the assertion of the Court of Appeals that, when a party is ordered to produce evidence from abroad, the discovery takes place only in the United States, and not in the nation where the evidence is located. This approach is apparently based on a theory that jurisdiction over evidence is determined not by the location of the evidence, but rather by the existence of personal jurisdiction over the party who has physical control over the evidence.

It cannot be disputed, however, that when evidence is sought from a foreign country for use in the United States, activities within the foreign country will be required to prepare the evidence for transmission. Documents may need to be reviewed and photocopied, persons interviewed, and written responses prepared, all within the country where the evidence is sought. Therefore, the assertion of the lower court that France, and by implication other countries, has no interest in activities within its borders preparatory to production of evidence in the United States is irreconcilable with the principle of territorial jurisdiction. This Court has stated that

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restrictions upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in

that power which could impose such restrictions. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself."

The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812). Absent use of the Convention, the United States lacks "the consent of the nation itself" to compel activities within that nation.

In particular, the lower court's theory is contradicted by the text of the Convention. Reflecting the right of member states to control the manner in which evidence within their territory is gathered, Article 11 of the Convention provides as follows:

"In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

"(a) under the law of the State of execution; or

"(b) under the law of the State of origin"

If the drafters of the Convention had intended that the production of evidence located in a foreign country be construed as taking place in the country requesting assistance, they would not have contemplated, as in Article 11, a refusal to give evidence "under the law of the State of execution"—that is, the country in which the evidence is located.

D. The United States Should Not Disregard Its Obligations Under International Law

The decision of the Court of Appeals, in rejecting the applicability of the Convention to the vast majority of cases it was intended to encompass, has effectively abrogated the duties of the United States not only to France, but to all countries that are members of the Convention. Under the fundamental rule of *pacta sunt servanda*, the

United States, including its courts, is required to follow the procedures of the Convention. To do otherwise is to breach the obligations of the United States as a nation, and risk endangering the viability of the Convention as a whole. A decision to violate the Convention should not be made without full consideration of the long-term effects on the international legal system, whose stability benefits the United States, as well as Switzerland and many other countries.

CONCLUSION

Although this case involves the collection of evidence from France, its resolution will affect use of the Convention to obtain evidence in other countries, including Switzerland. A failure by a U.S. court to use the Convention when it is applicable contradicts the obligations assumed by the United States under international law when it entered into the Convention. Accordingly, the Government of Switzerland respectfully urges the Court to vacate the judgment of the Court of Appeals and to remand the case with instructions mandating use of the Convention.

Respectfully submitted,

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**BRIEF OF THE GOVERNMENT OF THE
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

 No. 85-1695

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE and
 SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,

Petitioners,

v.

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IOWA,

Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
 REAL PARTIES IN INTEREST)

On Writ of Certiorari to the United States
 Court of Appeals for the Eighth Circuit

BRIEF OF THE GOVERNMENT OF THE
 UNITED KINGDOM OF GREAT BRITAIN
 AND NORTHERN IRELAND
 AS AMICUS CURIAE IN SUPPORT OF PETITIONERS *

* Both Petitioners and Respondent have consented to the appearance of the Government of the United Kingdom of Great Britain and Northern Ireland as an amicus curiae, and the written consents are on file with the Clerk. The decision below is reported at 782 F.2d 120 (8th Cir. 1986).

THE INTEREST OF AMICUS CURIAE

A. Statement of Issues

The amicus submits this brief in support of petitioners because the decision below threatens important interests shared by the United Kingdom and the United States in resolving, on the basis of mutual deference and respect, international judicial conflicts. It would be unfortunate if consideration in this case were given only to the narrow question of whether the United States, in ratifying the Hague Evidence Convention,¹ bound itself to use only the Convention to obtain information located abroad from a party over whom the court has personal jurisdiction. The two questions raised by petitioners in this appeal require consideration of the more significant included issue of:

Whether a United States court may require a party to produce information located abroad, in violation of a foreign "blocking law,"² without taking reason-

¹ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974).

² The term "blocking law" is used increasingly to refer to defensive laws adopted by a majority of the member states of the Organization for Economic Cooperation and Development. Their general purpose is to limit the extraterritorial application of the laws of foreign states seeking to regulate persons or conduct within another state in a manner or with consequences that are viewed as undermining the sovereignty of that other state. This case involves the French defensive law (French Penal Code Law No. 80-538, 1980 J.O., 1799, 1980 D.S.L. 285). The relevant portion of the law states:

Article 1—bis—Subject to treaties or international agreements and laws and regulations in force, it is forbidden to all persons to ask, research or communicate, by writing, orally or under any other form, documents or information on economical, commercial, industrial, financial or technical matters leading to

able steps, consistent with the principle of comity, to avoid or limit the (1) undermining of either nation's important interests or (2) imposing of conflicting legal requirements on individuals.

We submit that, as a matter of United States law, informed by the practice of other nations such as the United Kingdom, it may not.

B. The Interests of the Government of the United Kingdom

The Government of the United Kingdom believes it may be of assistance to this Court because this case presents issues which United Kingdom courts also consider from time to time. United Kingdom experience in dealing with them may be relevant because of our shared common law heritage, and because of our general agreement on the purposes and procedures of litigation. The United Kingdom also is a party to the Hague Evidence Convention, and it has an interest in ensuring that the Convention functions satisfactorily. Its general approach to the Convention appears to be closer to that of the United States than to that of other signatory nations, such as France, which follow the civil law tradition.

It is submitted that the view of the United Kingdom is consistent with U.S. law, and that this case may be properly decided without establishing that foreign parties before American courts necessarily owe a higher loyalty to American law than to the law of their home sovereign with respect to conduct in their home territory. If such a principle were sanctioned in this case,³ it not only would

establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings.

The French government has stated that it considers use of the Hague Evidence Convention (which is such an "international agreement . . . in force") to seek documents reasonably specific and directly relevant to the litigation generally unobjectionable under the law.

³ A recent case raising many of the same considerations as the case below which has been a source of particular concern to the

undermine U.K. authority over the activity of persons in the United Kingdom but may, in the converse situation, undermine the authority of the United States government to regulate the conduct of persons in the United States. The Atlantic partnership between our two nations and the international community would be ill-served thereby.

C. Statement of Facts

An aircraft manufactured by petitioners (defendants below) was involved in an accident in Iowa. Three persons sued petitioners in Federal court alleging tort liability, and they accepted the court's jurisdiction. Plaintiffs sought discovery under the Federal Rules of Civil Procedure. Petitioners, which are French corporations, sought a protective order requiring that plaintiffs' requests for information be channelled pursuant to the requirements of the Hague Evidence Convention, claiming that the relevant information was located in France, and that to furnish it by any other means would violate a French criminal statute. A magistrate acting on behalf of the district judge denied the request for a protective order and his denial was upheld by the court of appeals below on a petition for a writ of mandamus. The magistrate's action has been stayed pending decision by this Court.

ARGUMENT

I. IN THE VIEW OF THE UNITED KINGDOM, THE HAGUE EVIDENCE CONVENTION IS NOT IN ITSELF THE EXCLUSIVE MEANS OF GATHERING INFORMATION FROM A FOREIGN NATION; BUT THAT IS NOT DISPOSITIVE OF THIS CASE.

The Government of the United Kingdom agrees with the court below that the Hague Evidence Convention does not provide the exclusive and mandatory means for ob-

United Kingdom Government is *In re Grand Jury Proceedings The Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984), cert. den., — U.S. —, 105 S.Ct. 788 (1985).

taining documents and information located in another signatory state.⁴ That, however, is not the issue. It does not aid analysis to inquire whether the Convention is "mandatory" or "optional." It may be one or the other, depending on the manner of domestic implementation by the two signatory states involved.

The Convention deals with two quite distinct aspects of international judicial assistance and cooperation: the obligation of a signatory state in its capacity as a "receiving state" or "state of execution," with respect to foreign requests for information located in its territory, and its obligations when it acts as a "sending state" or "state of origin" and seeks information which is located in the territory of another signatory state.

When the United Kingdom acts as a "receiving state," its implementing legislation—the Evidence (Proceedings in Other Jurisdictions) Act 1975, c. 34—provides for the transmission of foreign evidentiary requests through the machinery established under the Convention ("the "Central Authority" which each signatory state must establish under Article 2 of the Convention). But United Kingdom law and practice does not make that transmission route exclusive by designating the Convention machinery as the only means for foreign litigants or foreign authorities to gather information in the United Kingdom. Nor, in fact,

⁴ Article 1 of the Convention expressly provides in pertinent part that—

In civil or commercial matters a judicial authority of a Contracting State *may*, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act. [Emphasis added.]

In addition, Article 27 of the Convention explicitly recognizes that the domestic law of a signatory state may permit the transmission of letters of request or the gathering of information or taking of evidence in its territory upon less restrictive conditions, or by methods other than those provided for in the Convention.

does it even make the Convention a preferred mechanism. Rather, foreign litigants may, by means of a letter of request, apply directly to the appropriate courts in the United Kingdom for judicial assistance. Further, foreign courts, or litigants before such courts, may seek information without the interposition of United Kingdom courts if, as in this case, the court of origin exercises jurisdiction consistent with accepted norms of international law.⁵ The United Kingdom does not consider evidence-gathering activities by foreign litigants on U.K. soil necessarily to be an infringement of its judicial sovereignty in all cases. United Kingdom law and practice is thus similar to that of the United States, *see* 28 U.S.C. § 1782.

This does not determine, however, the appropriate course when the United Kingdom—or in this case the United States—acts as a sending state.

II. IN SOVEREIGN JURISDICTIONAL CONFLICTS OVER THE FURNISHING OF INFORMATION, COURTS SHOULD FULLY ADDRESS CONSIDERATIONS OF COMITY BEFORE ALLOWING DISCOVERY TO PROCEED BY MEANS NOT RECOGNIZED BY THE FOREIGN SOVEREIGN.

A. Courts Should Give Due Regard To A Signatory State's Requirement That The Convention Be The Mandatory Method For Obtaining Information From Within Its Territory For A Foreign Adjudication.

The Government of the United Kingdom is mindful that, in the civil law tradition, the obtaining of information for an adjudication is deemed an "official" act reserved to the local authorities, and that the taking of

⁵ If the United Kingdom objects to the foreign assertion of jurisdiction, it may, of course, invoke the P.T.I.A., *see* p. 13 *infra*, but that is an exceptional case. Consistent with Article 12(b) of the Convention, the Convention would not be available in such a case as an alternative means of discovery.

evidence or gathering of information in the territory of civil law jurisdictions in aid of foreign proceedings by private attorneys, albeit officers of their courts, is deemed an infringement of the exclusive judicial sovereignty of such states. There was, of course, full recognition of the diverse traditions and policies prevailing in common law and civil law jurisdictions when the delegations from 20 civil and 4 common law jurisdictions met at the Hague in 1968 to attempt to bridge the gap between these different traditions. The basic principle which animated the negotiation of the Convention was the common belief that a system was needed for obtaining evidence abroad which was "tolerable" in the state of execution and produced evidence in a form "utilizable" in the state of origin.⁶

In ratifying the Convention, the United Kingdom—like the United States—did not change its domestic law and practice as a "sending state" so as to make the convention machinery exclusive for securing evidence from abroad. It would have made no sense to burden U.K. litigants by interposing novel barriers to the gathering of information from other common law jurisdictions whose laws and practices permit the gathering of information upon less restrictive conditions than those provided for in the Convention.⁷ But, mindful of the civil law tradition of judicial sovereignty, the Government of the United Kingdom did not thereby suggest that in the event foreign-source information could not be obtained "common law style" from within a given signatory state, U.K. courts were to overlook the legal traditions of such a state and

⁶ Conference de La Haye de Droit International Prive, IV *Actes et Documents de la Onzieme Session: Obtention des Preuves a l'Etranger* 202 (Bureau Permanent de la Conference ed. 1970).

⁷ In the recent case of *South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provinciën" N.V.*, speeches delivered 29 July 1986 [not yet reported], the House of Lords struck down limitations imposed by U.K. lower courts on parties in English proceedings who make application to U.S. courts, under 28 U.S.C. § 1782, for production of evidence to be used in the English proceedings.

simply order, on pain of sanctions, the production of the foreign-source information on United Kingdom soil.

It is the view of the Government of the United Kingdom that where a state signatory to the Convention has signified by domestic law or practice—as the French Republic has done—that information located in that state should be obtained by foreign litigants exclusively under the Hague Evidence Convention or some other international agreement,⁸ due regard for foreign sovereign interests counsels that the Convention machinery should be employed in the first instance. If such an endeavor does not succeed, U.K. courts are not barred, after balancing the relevant interests of the state of origin and the state of execution, from ordering the production of relevant information in the United Kingdom, drawing unfavorable inferences from the failure to produce such evidence, or in an extreme case, imposing sanctions.

B. Comity Is A Basic Practice Recognized By The United States And Exercised By The United Kingdom.

In addition to the respect for differing traditions implicit in the Hague Convention, mutual self-restraint is embodied in the judicial practice of the United States⁹

⁸ No other international agreement is relevant here.

⁹ The Solicitor General and Legal Adviser of the State Department agree. See Solicitor General's Brief for the United States as Amicus Curiae at 11, *Anchuetz & Co., GmbH v. Mississippi River Bridge Authority et al.* (1985) (No. 85-98). Not all United States courts have done so. One court has suggested that this Court granted a motion to compel discovery in *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers* ("Societe"), 357 U.S. 197, 204-06, with no "hint that the disclosure policies of the American statute should be balanced against the secrecy policies of Swiss law." *In re Uranium Antitrust Litigation*, 480 F. Supp. 1139, 1146 (N.D. Ill. 1979). However, the issue of whether a comity analysis is required was not decided by this Court in *Societe* because it was not considered. Review of the briefs submitted by the parties in *Societe* shows that Petitioner did

and the United Kingdom.¹⁰

The United States, together with the United Kingdom and France, has participated in an explicit declaration of the need to observe comity, issued by the Organization for Economic Cooperation and Development ("OECD"), through a series of recommendations endorsed by the OECD Council, meeting at the Ministerial level, on May 18, 1984.¹¹ This Court, too, has repeatedly acknowledged

not raise the issue of whether the courts below impermissibly failed to undertake a comity analysis in that case. The issue was raised indirectly by the Respondent (at 67) when it asserted, in passing, that the Swiss Government "cannot by its laws, better the position of its national, over itself and all other claimants when to do so would seriously prejudice the administration of justice to the opposing party" (citing 348 U.S. 356). In its Reply Brief (at 20), the Petitioner denied that it was raising any such contention and the issue was not joined or briefed.

¹⁰ Other nations likewise have shown sensitivity to considerations of comity. For example, in *Frischke v. Royal Bank*, 17 Ont.2d 388 (1977), the Ontario Court of Appeal determined that court ordered disclosure of information from bank officers in Panama would constitute a breach of Panamanian law. In language recognizing the clear primacy of the territorial state's interest, the court declined to require production, notwithstanding some significant Canadian interests that would have been furthered by doing so.

¹¹ Organization for Economic Cooperation and Development, PRESS/A (84)28, ¶ 36 (May 18, 1984). In relevant part, these recommendations state:

27. In contemplating . . . exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries concerned should:

i) . . .

ii) Endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other Member countries. . . .

Organization for Economic Cooperation and Development, International Investment and Multinational Enterprises: The 1984 Review of the 1976 Declaration and Decisions 26 (1984).

the need to give "due recognition of our self-regarding respect for the relevant interests of foreign nations." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); cf. *Lauritzen v. Larsen*, 345 U.S. 571, 581-82 (1953).

Lower United States courts have likewise recognized this principle. Not only have the courts of almost all circuits adopted some form of comity balancing test advanced in cases such as *Timberlane Lumber Co. v. Bank of America*,¹² but in a situation most closely analogous to this one within the federal system, lower courts have been unwilling to sustain contempt findings against state officials who have refused to furnish information to federal grand juries on the basis of state laws.¹³

¹² 549 F.2d 597, 613 (9th Cir. 1976); see *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 722 F.2d 657, 658 (11th Cir. 1983); *United States v. First National Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983); *Montreal Trading Ltd. v. Amaz, Inc.*, 661 F.2d 864, 869 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1302 (3d Cir. 1979) (concurring opinion); *In re Grand Jury Proceedings, United States v. Field*, 532 F.2d 404, 407 (5th Cir. 1976), cert. denied, 429 U.S. 940 (1976); *National Bank of Canada v. Interbank Card Association*, 507 F. Supp. 1113, 1119-20 (S.D.N.Y. 1980), aff'd on other grounds, 666 F.2d 6 (2d Cir. 1981). In *Laker Airways Limited v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), although Judge Wilkey declined to apply the *Timberlane* comity analysis to the particular fact situation, he noted that such an analysis might be more appropriate if the appellants were nationals of the foreign state whose interests would be balanced against American interests. *Id.* at 954 n.175. Further, in the earlier decision of *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1326 n.148 (D.C. Cir. 1980), Judge Wilkey expressly accepted the need to engage in balancing in the case of the very law here in issue. Cf. *Natural Resources Defense Council Inc. v. Nuclear Regulatory Commission*, 647 F.2d 1345, 1365 n.107 (D.C. Cir. 1981) (citing *Timberlane* to justify permitting Philippine sovereign interest to prevail over Nuclear Regulatory Commission administrative interest).

¹³ See, e.g., *In re Hampers*, 651 F.2d 19, 23 (1st Cir. 1981) ("comity and deference arising from federalism" support the grant-

The practice of U.K. courts also has been to exercise restraint in cases which might engender jurisdictional conflicts. In *R v. Grossman*,¹⁴ the Court of Appeal discharged an order of the lower court directed to the Barclays Bank in London which would have permitted the commissioners of Inland Revenue to inspect, and copy entries in, the books held in London by a Manx branch of the Barclays Bank.¹⁵ The judicial authority in the Isle of Man had issued an injunction against the Isle of Man branch, restraining it from disclosing the information in question. Under those circumstances, Lord Denning declared:

Any order in respect of the production of the books ought to be made by the courts of the Isle of Man—if they will make such an order. It ought not to be made by these courts. Otherwise there would be danger of a conflict of jurisdictions between the High Court here and the courts of the Isle of Man. That is a conflict which we must always avoid.

73 Crim. App. at 308.

Similarly, in *MacKinnon v. Donaldson Lufkin Corp.*, [1986] 2 W.L.R. 453, [1986] 1 All E.R. 653 (Ch.D.), Justice Hoffman of the High Court discharged a subpoena and order directing the Citibank branch in London to produce in London documents from its New York head office for use in an action involving alleged international fraud. Although no direct, conflicting sovereign command to the bank was shown, the court noted that "in a case like this, when alternative legitimate procedures are avail-

ing of a "qualified privilege" to state officials who act in accordance with a state nondisclosure law); *In re Cruz*, 561 F. Supp. 1042 (D. Conn. 1983) (same); *In re Grand Jury Empanelled Jan. 21, 1981*, 535 F. Supp. 537 (D.N.J. 1982) (same).

¹⁴ 73 Crim. App. 302 (C.A. 1981).

¹⁵ The Isle of Man has a separate legal system and is deemed a foreign jurisdiction by the courts of the United Kingdom.

able, an infringement of sovereignty can seldom be justified." [1986] 1 All E.R. at 662. Accordingly, it is to be expected that when presented with a situation similar to the one in this case, a United Kingdom court would not compel discovery but would favor the alternative procedure provided by the Hague Convention in order not to infringe upon the sovereignty of another state.

Further, in *Lonrho Ltd. v. Shell Petroleum* [1980] 1 W.L.R. 627 (H.L.), when South African and Rhodesian subsidiaries of an English company declined to disclose documents on the grounds that disclosure would constitute a criminal offense abroad, Lord Diplock held that this circumstance made it "quite unarguable" that the documents were ever in the "power" of the parent companies for the purposes of R.S.C. Order 24. The expression "power" was defined by Lord Diplock as "a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else." A clear inference to be drawn from this is that the existence of a local law prohibiting disclosure prevents the documents from being in a party's power for the purposes of R.S.C. Order 24.

C. Several Principles Should Guide a Court In Exercising Comity.

1. A Court Should Not Lightly Disregard Foreign States' Enactments of Defensive Laws.

The Republic of France, at least 13 other nations¹⁶ and the United Kingdom have all enacted defensive legislation with respect to foreign exercises of jurisdiction

¹⁶ See Restatement (Revised) § 437, Reporters' Note 1 (Tent. Draft No. 7, April 10, 1986). To the best of our knowledge, these nations have not, in peacetime, ever repudiated the territorial preference for resolving jurisdictional disputes, even in situations where this means foregoing their own claim to jurisdiction.

within their territories. Section two of the U.K. Protection of Trading Interests Act 1980, c. 11 ("P.T.I.A.") deals specifically with documents and information required by overseas courts and authorities. That section provides, *inter alia*, that the Secretary of State may by order prohibit compliance with requests for documents or information to be used in foreign legal proceedings when furnishing such information "infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to" its sovereignty, security, or relations with the government of any other country. It differs from the corresponding French law insofar as it is not self-executing and applies to very few situations in which foreign courts attempt to assert jurisdiction over persons and conduct in the United Kingdom. Since its adoption in 1980, this section of the Act has been invoked in relation to only two different matters. The Secretary of State issues a direction only after determining that vital U.K. interests in maintaining its territorial sovereignty are seriously threatened by an exercise of foreign jurisdiction, and after carefully weighing the potential effect on relations with the country concerned.

The P.T.I.A. is a self-protective measure designed to assure that this sovereign policy of the United Kingdom is respected. Consistent with the American act of state doctrine, the P.T.I.A. should not be subject to review, discount or attack by a U.S. court.

[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.¹⁷

¹⁷ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). This Court further opined in a case involving a conflict between federal law and the law of a state of the United States, that any supervised regulation of conduct within a state's territory which is predicated

United Kingdom courts are similarly disinclined to examine a foreign government's motives for promulgating laws. In *Settebello Ltd. v. Banco Totta & Acores*, [1985] 2 All E.R. 1025, Megaw, L.J., of the Court of Appeal stated:

The English court will not exercise its discretion to invite the judicial authorities of a friendly foreign state to use its powers to assist in the obtaining of evidence from a witness residing in that state, or in another friendly foreign state, directed toward seeking to establish what were the motives of [the foreign state's law promulgating body] in deciding on and publishing that law.¹⁸

The United Kingdom is entitled to exercise its sovereign power within its jurisdiction, and it is entitled to protect that exercise by the sovereign act of promulgating defensive legislation. The Republic of France, too, in enacting its defensive law, has engaged in an exercise of sovereign power. United States courts should not lightly reject such expressions of sovereign authority. A consistent application of the act of state doctrine will enhance mutual cooperation and will also render invocation of the P.T.I.A. much less necessary.

2. In Defining the Respective National Interests at Stake, Courts Should Consider Whether Those Interests are Truly in Conflict.

The United States has several substantial interests in this litigation. As the court below noted, there is an interest in "protecting United States citizens from harmful products and compensating them for injuries arising from

upon clear state policy should not be subject to attack. *Southern Motors Carriers Rate Conference, Inc. v. United States*, — U.S. —, 105 S.Ct. 1721 (1985).

¹⁸ *Id.* at 1031.

use of such products."¹⁹ French law does not challenge that interest, so long as adequate evidence may be obtained through the Hague Convention.²⁰ The United States also holds an interest in having adjudication go forward with the best evidence available. The French law does not challenge that interest. There is the further interest, frequently forgotten, in promoting respect for the sovereign equality of states under international law; American individuals and enterprises benefit when another nation's authorities manifest respect for United States sovereignty. It is in the interest of all concerned parties to foster a relatively stable and predictable international system in which it is possible at the same time to abide by the law of each friendly trading nation where one does business. The multinational corporation cannot prosper if it continually risks substantial economic sanction in developed countries.²¹

¹⁹ Pet. App. 23a.

²⁰ Determining whether U.S. interests are challenged necessarily requires consideration of available alternatives. As a U.S. court determined in holding that a state official had a qualified privilege to refuse to furnish information to a federal grand jury on the basis of a state nondisclosure law, a court must "seek a more particularistic answer than the macrocosmic one that effective federal criminal law enforcement is more important than state tax collection." *In re Hampers*, 651 F.2d 19, 23 (1st Cir. 1981). Similarly, another U.S. court, in resolving a conflict between a potential construction of the scope of FTC subpoena power and the very French law at issue here, acknowledged that the construction "less likely to conflict directly with regulations of other nations should be chosen." *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1327 n.150 (D.C. Cir. 1980).

²¹ See *Interamerican Refining Corporation v. Tezaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D.C. Del. 1970), in which the court stated in respect to application of American antitrust laws to anti-competitive practices compelled by foreign nations: "Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business. The Sherman Act does not go so far."

Simply weighing these United States interests *inter se* leads to the conclusion that the Hague Convention should be used here. U.S. interests may be adversely affected only by the occasion of some delay. Delay is often a regrettable aspect of litigation and reducing it is much to be desired. However, if the other substantial United States interests are served thereby, a finite delay is a small price worth paying.

3. *That the Information Sought Would Ultimately Be Produced in the United States Does Not Vitiolate the Territorial Interest of France.*

It must be recognized that France has a vital interest in having its defensive law respected as to information and conduct within its territory, even though the information can be produced within the United States. The United States itself recognizes a corresponding, vital United States interest in protecting against the dissemination of some information across its borders. For example, the United States restricts the flow of important technical data through the Export Administration Regulations, 15 C.F.R. Part 379, promulgated under the authority of the Export Administration Act, 50 U.S.C. app. § 2401 *et seq.* Similarly, Congress has responded to certain political boycotts by prohibiting United States persons from furnishing to boycotting countries information concerning the race, religion, sex, or national origin of any other United States person. 50 U.S.C. app. § 2407 (1982).²² Surely no court of the United States would rule that the United States government has no interest in the disclosure of

²² While the United Kingdom has expressed the most serious concern about the proper scope of U.S. jurisdiction to impose re-export controls and anti-boycott restrictions once goods and information have left U.S. territory, the sovereignty of the United States to impose those controls *within* the United States (including transmission of information across its borders) should not be challenged. That jurisdiction "is necessarily exclusive and absolute." *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C. J.).

such information merely because the disclosure takes place in another country.

The respondents here are seeking documents, interrogatory responses and admissions. Compliance by petitioners will require an extensive descriptive search of files in French offices. Company executives will have to be interviewed and will be required to review with counsel the significance of the documents and the appropriate responses and admissions. That is conduct in France. Even if the French corporate executives were to leave their offices and undertake this review outside France—*e.g.*, in the United States—a United States court will demonstrably have affected conduct in France by causing the departure of persons and removal of documents and information from France. The interest of a foreign sovereign in what its residents are directed to do within its territory is strong and indisputable even when the forum state attempts to enforce its orders solely by sanctions within the forum state and not by actually sending in its police. *Cf. Shaffer v. Heitner*, 433 U.S. 186 (1977) (the power to enforce a judgment by exercising control over property within the forum state is not sufficient to confer jurisdiction where a state has no substantial contacts).

4. *A Foreign State's Willingness To Assist U.S. Courts Generally Should Be Taken Into Account.*

U.S. judges may also give weight to the extent to which the courts and authorities of the foreign state routinely cooperate with courts of the requesting state. The courts of the United Kingdom recognize their general responsibility to assist the courts of the United States in adjudicating lawsuits involving U.K. subjects and nationals of other states. As Lord Denning observed,

it is our duty and our pleasure to do all we can to assist [a United States] court, just as we would expect the United States court to help us in like circumstances. 'Do unto others as you would be done

by.' *Re Westinghouse Electric Corporation Uranium Contract Litigation*, [1977] 3 All E.R. 703, 708.

The Republic of France has accepted its responsibilities by ratifying the Hague Evidence Convention. It would be improper for a national court to speculate whether the Republic of France will comply with a formal request under The Hague Convention. It is to be presumed that the Republic of France will, with due regard to comity, seek to assist the American court if doing so is consistent with its international obligations. The United States court will have the opportunity to reconsider the matter and to protect the interests of the parties to the litigation if the mechanism proves unfruitful and if justice so requires. *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S. Ct. 3346, 3359-3360 (1985) (feasibility of international arbitration of antitrust issues is not to be prejudged).²³

Because it appears that the substantial national interests of both the United States and France can be accommodated, this case should be a relatively easy one for a United States court to decide. The more taxing challenge will come when a U.S. court is asked to find a foreign state's interests in preventing production of information for United States courts sufficiently great as to demand a partial restriction of U.S. interests as a matter of comity. Such a challenge was presented to the English

²³ Concerns for due process and fairness to the parties have led this Court to define limits on the authority of lower courts to sanction parties for failure to produce required information. Absent bad faith conduct or the "courting of legal impediments", no sanctions should be imposed, *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers* ("Societe"), 357 U.S. 197, 209, 212 (1958), and adverse inferences should be drawn only as necessary to achieve fairness, not to deny it. However, neither bad faith by the party nor its courting of impediments can be a justification for overriding comity considerations in determining whether to order discovery in the first instance. Comity is intended to recognize the interests of foreign sovereigns as well as those of individuals caught in the middle.

court in *R. v. Grossman*²⁴ and was resolved in a manner favoring self-restraint.

III. THE APPLICATION OF ONE NATION'S LAWS IN A MANNER THAT REQUIRES VIOLATIONS OF THE LAWS OF A FOREIGN SOVEREIGN SHOULD BE AVOIDED WHENEVER POSSIBLE, BECAUSE OF THE FUNDAMENTAL UNFAIRNESS TO THE PERSON IN THE MIDDLE.

Foreign sovereign compulsion is a recognized defense under United States law. *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). United States courts regularly tailor orders so that parties will not be unfairly compelled to violate the law in their home or host nation. *E.g., United States v. General Electric Co.*, 115 F. Supp. 835, 878 (D.N.J. 1953) (decree in antitrust case provided that Dutch company would not be in contempt for doing anything outside the United States in accordance with the requirements of the state in which it was incorporated or doing business); *United States v. Watchmakers of Switzerland Info. Center, Inc.* [1965] Trade Cas. ¶ 71352 (S.D.N.Y. 1965) (antitrust consent decree expressly modified to take into account the requirements of Swiss law).²⁵ If the principle enunciated in those cases is followed, the protective order here should be granted. It would be anomalous and unsatisfactory, in any but the most extraordinary situation, for a court, in seeking to do justice, to require the violation of the law of a friendly sovereign state. Justice is not well served when disregard for the laws of a foreign sovereign is encouraged.

²⁴ See *infra* p. 11.

²⁵ It should be observed that in these cases, which involved remedial decrees, the existence of *in personam* jurisdiction was of course assumed. That did not prevent the court from giving proper regard to the laws of the foreign sovereign.

CONCLUSION

The governments of the United States, the Republic of France, the United Kingdom, and all other trading nations with developed legal systems have a common interest in the promotion of international trade and in the orderly and mutually supportive resolution of legal disputes which arise in international commerce. Reducing international jurisdictional conflicts is a vital national interest of the United States no less than of other nations.

Almost thirty years have passed since this Court, with great foresight, considered in *Societe Internationale v. Rogers*, several issues closely related to those raised here. That decision was a landmark of progress in resolving sovereign jurisdictional conflicts. This case provides an important opportunity for significant further progress to be made in the area of foreign sovereign conflicts—by promoting the practice of comity, by avoiding unfairness to the person in the middle, and by according due respect to the sovereign interests expressed in foreign defensive laws, especially where they seek to protect the effective implementation of clear public policies within the territory of the enacting state.

Accordingly, the judgment of the court of appeals should be reversed and the case remanded to the district court for an order directing the plaintiffs to use the Hague Evidence Convention to seek the required information.

Respectfully submitted,

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IN THE
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SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
v. *Petitioners,*

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF IOWA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

**BRIEF FOR ANSCHUETZ & CO. GMBH
AND MESSERSCHMITT-BOELKOW-BLOHM GMBH
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1695

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND
 SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
 v. *Petitioners,*

UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF IOWA,

Respondent.

On Writ of Certiorari to the
 United States Court of Appeals
 for the Eighth Circuit

BRIEF FOR ANSCHUETZ & CO. GMBH
 AND MESSERSCHMITT-BOELKOW-BLOHM GMBH
 AS AMICI CURIAE IN SUPPORT OF PETITIONERS

This amicus curiae brief is submitted in support of petitioners Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism. By letters filed with the Clerk of the Court, petitioners and respondents-real parties in interest Dennis Jones, John George and Rosa George have consented to the filing of the brief.

INTEREST OF AMICI CURIAE

Amici curiae are two German manufacturing companies involved in cases pending before this Court. Amicus Anschuetz & Co. GmbH is the petitioner in No. 85-98, seeking review of the decision of the U.S. Court of Appeals for the Fifth Circuit in *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985). Amicus Messerschmitt-Boelkow-Blohm GmbH is the petitioner in No. 85-99, seeking review of the decision by the same court in *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d

729, 731 (5th Cir. 1985). The panel deciding *Messerschmitt* followed the reasoning of the *Anschuetz* decision. On April 21, 1986, the Court granted the petition for certiorari in No. 85-99, but vacated its order on June 9, 1986 and instead granted certiorari in the instant case, No. 85-1695. The decision below, *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir. 1986), also followed the *Anschuetz* reasoning.

The cases in which amici are petitioners, like the present case, raise the question of what principles should guide U.S. courts in determining when litigants should use the procedures established by the Hague Evidence Convention to obtain extraterritorial discovery. Accordingly, the Court's decision in this case will directly affect the eventual disposition of the petitions in *Anschuetz* and *Messerschmitt*.

STATEMENT

As set forth in petitioner's brief, this case centers on a discovery dispute between French corporate defendants and private U.S. plaintiffs seeking to use domestic U.S. discovery methods to obtain information located in France. Accordingly, it is but a particular instance of the international conflicts that can arise when controversies between parties from different countries are brought before the courts of one country. Substantive and procedural rules usually differ substantially from one country to another, and the issue presented by this case is how U.S. courts should deal with this divergence in the area of pretrial discovery.

Sharp international differences exist on the subject of extraterritorial U.S. discovery. The liberal United States approach of permitting private litigants, with minimal judicial supervision, to comb each other's files and spend days deposing the executives of their opponents is sometimes disturbing even to litigants who are at home with the U.S. system. U.S. pretrial discovery is not merely disturbing but anathema to foreign parties accustomed to much more limited and carefully supervised evidence-

gathering procedures. At the same time, whatever their reservations may be about U.S. discovery in general, U.S. parties naturally believe that it would be fundamentally unfair to deprive them of information helpful to their position simply because the information happens to be located outside the United States.

In the face of this basic conflict, U.S. courts have taken two quite different approaches to extraterritorial discovery. First, U.S. courts have frequently invoked the discovery provisions of their procedural rules to order foreign nationals to produce documents,¹ answer interrogatories,² and provide witnesses for depositions,³ disre-

¹ See, e.g., Pet. for Cert. 1a, 5a; *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 788 F.2d 1408 (9th Cir. 1986); *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 611 (5th Cir. 1985), pet. for cert. filed, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) [hereinafter "No. 85-98"]; *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729, 731 (5th Cir. 1985), cert. granted, 106 S. Ct. 1633, order for cert. vacated, 106 S. Ct. 2887 (1986) [hereinafter "No. 85-99"]; *Lowrance v. Michael Weinig, GmbH*, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 444 (S.D.N.Y. 1984); *Adidas (Canada) Ltd. v. SS Seatrains Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. May 30, 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 520-24 (N.D. Ill. 1984); *Murphy v. Reifenhauer KG Maschinenfabrik*, 101 F.R.D. 360, 361 (D. Vt. 1984); *La Chemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 604 (D. Del. 1971), aff'd, 487 F.2d 312 (3d Cir. 1973); *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979); *Wilson v. Lufthansa German Airlines*, 108 A.D.2d 393, 489 N.Y.S.2d 575, 577 (1985).

² See, e.g., Pet. for Cert. 1a, 5a; *Club Mediterranee v. Dorin*, 104 S. Ct. 1268 (1984); *Anschuetz*, 754 F.2d at 611; *Messerschmitt*, 757 F.2d at 733 & n.16; *Lowrance v. Michael Weinig, GmbH*, 107 F.R.D. at 388-89; *Graco*, 101 F.R.D. at 520-24; *Murphy*, 101 F.R.D. at 361.

³ See, e.g., *Adidas (Canada) Ltd. v. SS Seatrains Bennington*, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. May 30, 1984); *Seuthe v. Renewal Prods., Inc.*, 38 F.R.D. 323 (S.D.N.Y. 1965); *Slade v. Transatlantic Fin. Corp.*, 21 F.R.D. 146 (S.D.N.Y. 1957); *Schultz v. KLM Royal Dutch Airlines*, 21 F.R.D. 20 (E.D.N.Y. 1957); *Supine v. Compagnie Nationale Air France*, 21 F.R.D. 42 (E.D.N.Y. 1955); *Chemical Specialties Co. v. Ciba Pharmaceutical*

garding objections based on the foreign location of the evidence and the foreign nationality of the parties. This is the approach taken by the court of appeals in the present case and by the U.S. Court of Appeals for the Fifth Circuit in the two cases in which amici Anschuetz and Messerschmitt have petitioned for certiorari.⁴ As long as the court has personal jurisdiction over the foreign person, U.S. law gives it the power to order actions that will take place outside the court's geographical jurisdiction.⁵ If the foreign litigant has assets in the United States it may have no choice but to comply with such discovery orders.

Ignoring the expectations of foreign parties and the sovereign interests of foreign states, however, has serious consequences. Extraterritorial discovery has caused substantial conflict between the United States and its trading partners.⁶ Sometimes this conflict is reflected in official diplomatic protests lodged with our State Department.⁷ In addition, the vigorous pursuit of U.S. discovery

Prods., 10 F.R.D. 500 (D.N.J. 1950); *Producers Releasing Corp. de Cuba v. PRC Pictures*, 8 F.R.D. 254 (S.D.N.Y. 1948); *Alfred Bell & Co. v. Catalda Fine Arts*, 5 F.R.D. 327 (S.D.N.Y. 1946).

⁴ Pet. for Cert. 7a; *Anschuetz*, 754 F.2d at 611; *Messerschmitt*, 757 F.2d at 732.

⁵ See, e.g., *Societe Internationale v. Rogers*, 357 U.S. 197, 199-200, 204-06 (1958).

⁶ See, e.g., *Restatement (Revised) of Foreign Relations Law of the United States* § 437, Reporter's Note 1 (Tent. Draft No. 7, April 10, 1986), adopted May 14, 1986 ("no aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States").

⁷ See Petitioners' Brief in Response to the Solicitor General's Brief for the United States, Nos. 85-98 and 85-99, at 1a-4a (diplomatic notes from the Federal Republic of Germany); *id.* at 5a-10a (diplomatic note from France); Reply Brief of Petitioner, No. 85-98, at 1a-2a (diplomatic note from France), 3a-4a (diplomatic note from the United Kingdom); Brief for the United States as Amicus

abroad has led numerous foreign governments to enact "blocking statutes" making it illegal to comply with discovery demands in U.S. litigation.⁸

There is a second approach available, however, to U.S. courts seeking information from abroad in private civil cases: use of the Hague Evidence Convention,⁹ a multilateral treaty specifically designed "to improve mutual judicial cooperation in civil or commercial matters" with respect to evidence-taking.¹⁰ In providing "methods to

Curiae, Volkswagenwerk AG v. Falzon, No. 82-1888, at 1a-10a (diplomatic notes from the Federal Republic of Germany).

These are only the most recent in a long line of foreign protests against extraterritorial U.S. discovery. The Reports of the International Law Association contain numerous examples of foreign protests asserting that U.S. demands for document production violate their sovereign rights under international law. Report of the Fifty-First Conference, International Law Association 565-92 (Tokyo 1964); Report of the Fifty-Second Conference, International Law Association 132 (Helsinki 1966).

⁸ See Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 Fordham L. Rev. 877 (1982); Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-resident Parties to American Litigation*, 17 Int'l Law. 61 (1983); Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, 596-97 (1981).

⁹ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter cited as "Hague Evidence Convention"].

¹⁰ In response to a request from the United States government, the Convention was negotiated and drafted between 1968 and 1970 under the auspices of the Hague Conference on Private International Law. Since that time, seventeen countries have ratified the Convention, including the United States (in 1972), France (in 1974), and Germany (in 1979). The legislative history (or *travaux preparatoires*) of the Convention has been compiled by the Permanent Bureau of the Hague Conference. Conference de La Haye de Droit International Prive, *Actes et Documents de la Onzieme Session, Tome IV, Obtention des preuves a l'etranger* (1970) [hereinafter cited as "Convention History"]. See generally 1 B. Ristau,

reconcile the differing legal philosophies of the Civil Law, Common Law and other systems,"¹¹ as well as "methods to satisfy doctrines of judicial sovereignty,"¹² the Convention establishes the "letter of request" as the principal means of taking evidence from the territory of nations party to the Convention.¹³ A letter of request, like the customary letter rogatory, is a judicial request addressed to a foreign sovereign authority requesting it to obtain evidence located on its territory. Unlike customary letters rogatory, letters of request must be executed expeditiously by Contracting Parties unless the request comes within certain limited exceptions.¹⁴ If necessary, receiving states must apply "the appropriate measures of compulsion" available under internal law.¹⁵

International Judicial Assistance (Civil and Commercial), Part V, at 177-268.5 (1984).

¹¹ Convention History, *supra* note 10, at 55 (Report of the Special Commission).

¹² *Id.*; see *id.* at 83 (debates); Message From President Transmitting Hague Evidence Convention, S. Exec. A., 92d Cong., 2d Sess. VI (1972).

¹³ Articles 10 through 14. The Convention provides two other methods of taking evidence. Article 17 permits a commissioner appointed by a court of the requesting state to take evidence in the requested state provided that: (1) no compulsion is used; (2) permission has been given by the requested state; and (3) any conditions imposed by the requested state are observed. Articles 15 and 16 permit diplomatic officers or consular agents to take evidence from their own nationals (typically with few restrictions) or from others (with restrictions similar to those under Article 17).

¹⁴ A receiving state may refuse to execute a letter of request only if it seeks privileged information (Art. 11); if it requests performance of non-judicial functions or actions prejudicial to the state's "sovereignty or security" (Art. 12); or if it was issued for purposes of "pre-trial discovery of documents as known in Common Law countries," insofar as the individual country has reserved the right to refuse (Art. 23). Any state that refuses to execute a letter of request is required immediately to inform the requesting authority and advise it of the reasons for the refusal (Art. 13).

¹⁵ Art. 10.

Many state and federal courts in the United States have sought to avoid interjurisdictional conflict in foreign discovery by using these Convention procedures rather than discovery orders under the Federal Rules of Civil Procedure.¹⁶ In the Federal Republic of Germany, the designated authorities have received approximately 181 letters of request from U.S. courts since the treaty entered into effect with the United States in 1979.¹⁷

The present case requires this Court to determine the extent to which U.S. law constrains U.S. courts in choosing between these two alternative means of seeking information from abroad. Specifically, the Court must decide whether applicable legal principles permit unlimited U.S.-style discovery despite the international conflict that inevitably results, or whether such principles require U.S. courts to accommodate domestic and foreign interests by using discovery procedures established by the Hague Evidence Convention.

SUMMARY OF ARGUMENT

The principle of comity is well established in federal law. This principle, when properly analyzed and applied, provides the necessary guidance for U.S. courts called upon to decide when litigants should use the procedures established by the Hague Evidence Convention to discover

¹⁶ See, e.g., *Gebr. Eickhoff Maschinenfabrik und Eisengieberei GmbH v. Starcher*, 328 S.E.2d 492, 504-06 (W. Va. 1985); *Th. Goldschmidt AG v. Smith*, 676 S.W.2d 443, 445 (Tex. Ct. App. 1984); *Vincent v. Ateliers de la Motobecane, S.A.*, 193 N.J. Super. 716, 475 A.2d 686, 690 (1984); *General Elec. Co. v. North Star Int'l, Inc.*, No. 83 C 0838 (N.D. Ill. Feb. 21, 1984) (memorandum opinion and order); *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983); *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) 17,222, 17,223-24 (N.D. Ill. Sept. 15, 1983); *Pierburg GmbH v. Superior Court*, 137 Cal. App. 3d 238, 243-44, 186 Cal. Rptr. 876, 879-80 (1982); *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (memorandum of decision).

¹⁷ Statistics provided by Dr. Christof Boehmer, Federal Ministry of Justice, Bonn, Federal Republic of Germany.

information located abroad. Comity analysis requires careful consideration of the nature and weight of the foreign, domestic, and international system interests implicated by extraterritorial pretrial discovery and the extent to which those interests can or cannot be accommodated by a particular method of discovery.

The court of appeals completely misunderstood the requirements of comity when it decided that, as long as evidence located abroad is to be delivered in the United States, there is no need to consider the interests of foreign sovereigns before ordering discovery under U.S. procedures. To the contrary, whenever a U.S. court orders information to be produced from within the territory of another country, that state's sovereignty is implicated for comity purposes—even if the information is turned over to the opposing side in the United States.

When Hague Convention procedures offer a litigant the prospect of obtaining useful information, those procedures adequately accommodate the U.S., foreign, and international system interests implicated by extraterritorial U.S. discovery. Applying a proper comity analysis, therefore, this Court should adopt the general rule that Convention procedures must be used in the first instance, except in those rare cases in which the U.S. litigant shows that no useful information can be obtained through the Convention. Only after exhausting Hague Convention procedures should U.S. courts consider ordering production of information from within the territory of a foreign nation objecting to such production.

ARGUMENT

I. U.S. Discovery of Information Located Within the Territory of a Foreign Country Implicates the Sovereign Interests of that Country, Even If the Information Will Be Delivered in the United States.

The court of appeals' ruling in this case rests on its assumption that ordering information to be produced from abroad can infringe foreign sovereign interests only

if the physical act of production occurs within the foreign country's borders.¹⁸ Because the production of information from French sources was specified to take place in the United States, the court of appeals decided there was no need even to try to reconcile the interests of France with those of the United States. In so ruling, the court of appeals utterly disregarded the sovereign interests of France. Use of U.S. discovery methods to demand production of information located in a foreign country implicates that country's sovereignty, even if the physical delivery of the information takes place in the United States.¹⁹

That U.S. courts do trench upon legitimate interests of foreign sovereigns in ordering parties to bring information located abroad to this country is shown most directly by the statements of foreign governments themselves.²⁰ Certainly the fact that physical production was to occur in the United States did not assuage Germany's concern in Nos. 85-98 and 85-99 that the court-ordered discovery "violates the Federal Republic of Germany's sovereignty."²¹ Similarly France, in enacting blocking legislation in response to U.S. discovery, made clear that it was to cover all information to be transferred from France to a foreign country for production there.²² The

¹⁸ Pet. for Cert. 4a ("the civil law signatories' concern for judicial sovereignty would only be threatened when discovery procedures that are typically considered a judicial function are actually undertaken within the signatories' borders by a private party"). *Accord Anschuetz*, 754 F.2d at 611; *Messerschmitt*, 757 F.2d at 731; *Graco*, 101 F.R.D. at 521; *Murphy*, 101 F.R.D. at 362-63.

¹⁹ Meessen, *The International Law on Taking Evidence From, Not In, a Foreign State: The Anschütz and Messerschmitt Opinions of the United States Court of Appeals for the Fifth Circuit* (March 31, 1986), at 22a-28a, originally submitted to this Court in Nos. 85-98 and 85-99 and reprinted for the convenience of the Court as the Appendix to this brief.

²⁰ See *supra*, note 7.

²¹ Brief for the Federal Republic of Germany as Amicus Curiae, No. 85-98, at 3 (supporting petition for writ of certiorari).

²² Article 1-bis, Law No. 81-550 of July 17, 1980, reprinted in, J. Fedders, J. Harris, R. Olsen & B. Ristau, 2 *Transnational Litiga-*

grave concerns expressed by America's trading partners are based on where the information is located, for they consider the holders of such information to be entitled to the protection of local law.²³

Such strong statements by friendly nations like Germany and France are entitled to substantial weight in and of themselves. These objections are particularly telling in a case such as this, however, because they are not prompted by the mere desire to protect their nationals from the vagaries of U.S. litigation. To the contrary, the reason that such nations react vehemently to U.S.-style discovery of information located within their borders is that it undermines long-established procedural principles protecting persons and businesses within their borders from what those nations regard as undue intrusions upon privacy and business secrecy.²⁴

An examination of German law amply demonstrates this point. The central protection provided by the Federal Republic of Germany for personal and business secrecy is the requirement that all evidence-taking be conducted by judicial authorities. After the filing of the initial pleadings, it is the judge—not the parties—who decides what evidence should be taken and conducts almost all of

tion: Practical Approaches To Conflicts and Accommodations 1329 (1984); see Petitioners' Brief in Response to the Solicitor General's Brief for the United States, Nos. 85-98 and 85-99, at 10a (diplomatic note from France).

²³ See Report of the Fifty-Second Conference, International Law Association 132 (Helsinki 1966) (reprinting Report of Committee on the Extra-Territorial Application of Restrictive Trade Regulation, American Branch of the I.L.A.) (foreign protests are "founded upon the contention that an order for such production, issued within the territory of a prosecuting State, and requiring acts in the territory of another State, constitutes an attempt by the former to exercise its public power indirectly in the territory of the latter where admittedly such power could not be exercised directly"); Meessen, *supra* note 19, at 22a-28a (Appendix).

²⁴ See generally Meessen, *supra* note 19, at 22a-28a (Appendix).

the evidence-taking at one or more hearings or "conferences." ²⁵

Moreover, there are three particular aspects of German procedure that ensure that the judge, in exercising this authority, will not intrude on the privacy interests of the parties recognized under German law. First, "in diametrical contrast to, for example, Federal Rule Civil Procedure 26, German courts will not grant a motion for the taking of evidence that is not directed at *proving* plausible facts, but is rather designed to *produce* such facts." ²⁶ Second, German law recognizes a number of constitutional and statutory privileges. These privileges include the right to refuse to testify about business secrets,²⁷ professional confidences,²⁸ matters that might lead to self-incrimination, and the like.²⁹ Third, German law narrowly circumscribes the situations in which a German court will compel the disclosure of documents.³⁰ The ulti-

²⁵ Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 826-28 (1985); Heck, *Federal Republic of Germany and the EEC*, 18 Int'l Law. 793, 794-95 (1984); Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 Harv. L. Rev. 1193, 1206-07, 1247-49 (1958).

²⁶ Heck, *supra* note 25, at 794 (emphasis added); Kaplan, *supra* note 25, at 1234, 1246-47.

²⁷ Baumbach, Lauterbach, Albers, Hartmann, *Zivilprozessordnung* (ZPO) § 384(4) (44th ed. 1986); Schlosser, *Internationale Rechtshilfe und rechtsstaatlicher Schutz von Beweispersonen*, 94 Zeitschrift fuer Zivilprozess 369, 402-05 (1981). The protection for business secrets has its roots in the guarantee of property rights in the German Constitution. Article 14, Basic Law.

²⁸ Kaplan, *supra* note 25, at 1238 & n.186.

²⁹ *Id.* at 1238 & n.187.

³⁰ *Id.* at 1240-41. A party has a right to a document referred to in its adversary's pleadings. Beyond this, German substantive law only grants a right to obtain documents that were prepared in the requesting party's interest, that memorialize a legal relationship, or that embody certain types of negotiations. *Id.* at 1240 & n.198; ZPO § 422; Buergerliches Gesetzbuch (BGB) § 810. Although German law does not require disclosure of documents outside these exceptions, witnesses can be required to testify orally about the

mate source of these limits on the scope of evidence-taking is a principle of proportionality laid down by the German constitution.³¹

Against this backdrop, it is plain why nations such as Germany regard a U.S. court order for German nationals to produce information located in Germany for use in U.S. litigation as an invasion of German sovereignty.³² Under U.S. discovery rules, parties may delve without judicial supervision into an extremely broad range of matters by means of depositions, interrogatories, document requests, inspections of property, and other meth-

contents of documents (subject to relevancy and privilege limitations). Court of Appeals (Munich), *Petition for Review of an Administrative Ruling under Secs. 23 et seq., EGGVG*, Docket No. 9 VA 3/80, 20 Int'l Leg. Mat. 1049 (1981).

³¹ Meessen, *supra* note 19, at 27a-28a (Appendix) (explaining principle of proportionality); Heck, *supra* note 25, at 794; 38 *Entscheidungen des Bundesverfassungsgerichts* 105, 114 (1975) ("the witness' sphere of privacy and other personal rights guaranteed under Articles 2 ¶ 1 and 1 ¶ 1 of the Basic Law may not be encroached upon by procedural law and its application by parties to a proceeding").

³² German law forbids German courts from sending written interrogatories to witnesses abroad. § 39 *Rechtshilfeordnung fuer Zivilsachen* (ZRHO), reprinted in 2 Buelow, Boeckstiegel, *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, GI/900 (1985); see also Convention History, *supra* note 10, at 21. The Solicitor General has suggested that European courts would be willing to order production of evidence located abroad, Brief for the United States as Amicus Curiae, Nos. 85-98 and 85-99, at 16 n.18. He cites the English summary of a German article which produces no actual case law in support of this erroneous assertion. Instead, the article relies on fallacious extrapolations from certain specialized areas of substantive law, such as paternity and tax law. Moreover, the article cited by the Solicitor General deals with the much less troublesome issues that arise when a witness from one civil law country, e.g., Italy, is asked to give evidence in another civil law country, Germany, where he will enjoy essentially the same substantive and procedural protections as he is afforded at home. See Schlosser, *Der Justizkonflikt zwischen den USA und Europa* 17-21 (1985).

ods.³³ The requirement of relevance poses no more than a minimal restriction; Rule 26 of the Federal Rules of Civil Procedure is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."³⁴ When these techniques are used to demand sweeping and unsupervised disclosure of information located in a foreign country, such as Germany, they disrupt the protections for privacy and business secrecy provided by that country's legal regime. The resulting encroachment on that nation's judicial sovereignty cannot be swept aside merely by asserting—as did the court of appeals in this case—that the "discovery" takes place in the United States rather than abroad.

³³ In No. 85-98, for example, document requests included: all documents relating to the design, testing, inspection, steering emergencies, assembly, installation, or integration of Anschuetz products installed on ships before their "going to sea" from 1974 to the present; all documents relating to information given Anschuetz representatives concerning negotiation of contracts on behalf of Anschuetz between 1974 and 1983; and all information Anschuetz gave its representatives for conduct of Anschuetz business. See Pet. for Cert., No. 85-98, at 4 n.2.

³⁴ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). See also *United States v. Procter & Gamble*, 356 U.S. 677, 679 n.2 (1958); *Hickman v. Taylor*, 329 U.S. 495, 500-10 (1947).

The unbridled discretion of litigants, and the resulting discovery abuses, have been criticized by members of this Court, along with many observers and members of the bar. Advisory Committee Notes to 1983 Amendments to Rule 26 of the Federal Rules of Civil Procedure (quoting *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring)); ABA Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse 9 (1980); 1980 Amendments to the Federal Rules of Civil Procedure (Powell, J., dissenting), 85 F.R.D. 521, 522 (1980).

II. The Principle of International Comity Requires U.S. Courts To Accommodate the Interests of Foreign Countries by First Using the Hague Evidence Convention To Obtain Information Located Within Their Territories.

Whenever foreign sovereign interests are infringed by extraterritorial discovery, the principle of international comity should temper U.S. courts' exercise of their power to order that foreign parties bring information to this country. Moreover, although the comity principle requires consideration of a number of factors in determining how to apply U.S. discovery law in cases implicating foreign interests, careful analysis demonstrates that these factors point to a general rule in extraterritorial discovery cases such as the one presented here: In all but rare cases, comity requires initial use of Hague Evidence Convention procedures before means of discovery objectionable to the foreign country are considered.

A. In Cases Implicating Foreign Sovereign Interests, Comity Requires that U.S. Courts Seek To Accommodate Domestic, Foreign and International System Interests.

U.S. law has always required that U.S. courts, to the extent practicable, consider foreign sovereign interests and attempt to accommodate them in adjudicating disputes affecting such interests. This requirement has become known as the principle of "international comity."³⁵

³⁵ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3348 (1985); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Windward Shipping Co. v. American Radio Ass'n.*, 415 U.S. 104, 112-13 (1974); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762, 765 (1972); *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562, 575 (1926); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918); *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *Wildenhus's Case*, 120 U.S. 1, 12 (1887); *The Belgenland*, 114 U.S. 355, 363 (1885); *Bank of Augusta v. Earle*, 38 U.S. 517, 589-90 (1839); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 360 (1827); *Harvey v. Richards*, 11 F. Cas. 746, 756 (C.C.D. Mass. 1818) (No. 6,184). The principle of comity entered the jurisprudence of this Court in the margin of

As this Court said in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895):

'Comity,' in the legal sense is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens.

As this definition indicates, three kinds of interests must be analyzed in applying the general principle of comity in particular cases: (1) relevant domestic interests reflected in U.S. laws and policies ("the rights of its own citizens"); (2) relevant foreign interests reflected in the laws and policies of affected foreign countries ("the legislative, executive or judicial acts of another nation"); and (3) the mutual interests of all nations in the maintenance of a smoothly functioning international legal regime ("international duty and convenience").

In making the comity analysis, this Court has not allowed itself to become preoccupied with whether expansively conceived U.S. interests can be fully satisfied.³⁶ Instead, it has asked whether both domestic and foreign interests can be adequately served by reconciling the central concerns of both, and whether alternative courses of action will promote or impede the development of the international legal system.³⁷

Emory v. Grenough, 3 U.S. (3 Dall.) 368, 369 n. (1797) (Huber's third maxim from *De conflictu legum*).

³⁶ Cf. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts"); *Restatement (Second) of Conflict of Laws* § 6, comment f, at 14 (1971).

³⁷ See, e.g., *Mitsubishi v. Soler*, 105 S. Ct. at 3348 ("[c]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question, even assuming that a contrary result would be forthcoming in a domestic context"); *Scherk v. Alberto-Culver Co.*, 417 U.S.

Historically the application of the principle of comity by this Court has often generated general rules governing recurring factual situations.³⁸ Such rules have been

506, 516-17 (1974) ("achievement of the orderliness and predictability essential to any international business transaction"); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959) ("the interacting interests of the United States and of foreign countries"); *Lauritzen v. Larsen*, 345 U.S. 541, 582 (1953) ("rules designed to foster amicable and workable commercial relations"); *Hilton v. Guyot*, 159 U.S. at 191 ("[i]f a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations") (quoting *Bradstreet v. Neptune Ins. Co.*, 3 Sumner 600, 608-09 (C.C.D. Mass. 1839)); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812) ("[t]he world being composed of distinct sovereignties . . . whose mutual benefit is promoted by intercourse with each other"). Cf. *Restatement (Second) of Conflict of Laws* § 6, comment d (1971) ("[a]doption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result").

Comity as recognized in United States law is a requirement under international law. Meessen, *supra* note 19, at 18a-21a (Appendix) (discussing principles of international law that underlie the U.S. law of comity). Comity as a requirement of international law was recently recognized by the American Law Institute when it adopted the *Restatement (Revised) of Foreign Relations Law of the United States* § 403, comment a (Tent. Draft No. 7, April 10, 1986), adopted May 14, 1986. See also J. Story, *Commentaries on the Conflicts of Laws, Foreign and Domestic* § 35 (8th ed. 1883) ("[t]he true foundation on which the administration of international law must rest is that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconvenience which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return"); *id.*, § 38 ("comity of nations" . . . is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another").

³⁸ General principles requiring consideration of a number of factors have produced rules in other areas of the Court's jurisprudence as well. For example, the Court has promoted "comity and federalism" in the context of state-federal relations by resort

established, for example, in the choice of law area³⁹ and most strikingly in choice-of-forum cases.⁴⁰ The principle of international comity has also generated rules of maritime law⁴¹ and rules concerning application of the doc-

to general rules. See, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 54 U.S.L.W. 4860, 4862-63 (U.S. 1986) (federal court should not enjoin pending state administrative proceeding by civil rights commission); *Younger v. Harris*, 401 U.S. 37, 41-45 (1971) (federal court should not enjoin pending state criminal prosecution).

Similarly, in the area of procedural due process, the Court has derived rules based on factors such as the importance of the individual interest at stake, the likely benefits of procedural safeguards, and the effect on governmental interests. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1493-96 (1985) (before terminating public employee who can be discharged only for cause, employer must give notice and an opportunity to respond); *Mathews v. Eldridge*, 424 U.S. 319, 332-49 (1976) (no pretermination evidentiary hearing required before terminating Social Security disability benefits; post-termination hearing sufficient); *Morrissey v. Brewer*, 408 U.S. 471, 481-89 (1972) (evidentiary hearing with cross-examination required before revoking parole); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (pretermination evidentiary hearing required before terminating welfare benefits).

³⁹ See, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. at 303-04 (act of state doctrine "rests at last upon the highest considerations of international comity and expediency"); *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 539 (1883) ("the true spirit of international comity" requires U.S. courts to recognize a bankruptcy reorganization plan in a foreign court); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. at 765 (opinion of Rehnquist, J.) ("[t]he act of state doctrine, like the doctrine of immunity for foreign sovereigns, has its roots, not in the Constitution, but in the notion of comity between independent sovereigns").

⁴⁰ See, e.g., *Mitsubishi v. Soler*, 105 S. Ct. at 3348; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("the forum clause should control absent a strong showing that it should be set aside").

⁴¹ *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562 (1926); *Wildenhus's Case*, 120 U.S. 1 (1887); *The Belgenland*, 114 U.S. 355 (1885); *The*

trine of sovereign immunity.⁴² And the Court's analysis in *Hilton v. Guyot* itself produced the general rule, albeit later criticized, that U.S. courts will enforce judgments of foreign courts only insofar as the foreign courts would themselves enforce U.S. judgments in similar circumstances.⁴³

In the present case, there can be no question but that the principle of comity should be applied to determine how the requested extraterritorial discovery should be achieved. As explained above, the court of appeals was plainly mistaken in concluding that comity had no place here because all foreign interests had been eliminated once it was specified that production of the information sought should occur in the United States. The true issue before the Court, therefore, is how the factors in a comity analysis are to be assessed in situations such as this, and to what extent the outcome can be expected to vary from case to case.

B. Comity Requires U.S. Courts To Use the Hague Convention in the First Instance To Obtain Information Located Abroad in Signatory Countries.

Given the nature of discovery disputes such as this, it is difficult to apply the general principle of comity and not conclude that U.S. courts should use the agreed-upon procedures of the Hague Evidence Convention before they pursue discovery techniques that are unacceptable to foreign countries. Examination of the relevant comity considerations demonstrates that the U.S. court should

Scotia, 81 U.S. (14 Wall.) 170 (1871); *Brown v. Duchesne*, 60 U.S. (How. 19) 183 (1856); *The Schooner Exchange v. McFaddon*, 11 U.S. (Cranch 7) 116 (1812).

⁴² See *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983) (based on respect for "principles of comity between nations," presumption that for purposes of sovereign immunity, "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such").

⁴³ 159 U.S. 113 (1895).

always use the Hague Convention in the first instance, except in rare cases where the requesting party demonstrates that Convention procedures will produce no useful information.⁴⁴ In addition to the historical practice of deriving general rules from a comity analysis, there are powerful pragmatic reasons why this Court should enunciate a general rule, rather than leaving it to individual trial courts to make the comity analysis on a case-by-case basis.

1. First Use of the Hague Convention Substantially Accommodates the Interests of U.S. Litigants in Obtaining Discovery.

Litigants in U.S. courts have a legitimate interest in obtaining evidence from abroad that may assist them in preparing their case. The Hague Convention protects that interest.⁴⁵ The drafters of the Hague Convention designed the letter of request procedure to provide "a method acceptable to the State of execution, and also utilizable by the State of origin."⁴⁶ Receiving countries have honored their treaty obligations to execute these letters of request expeditiously and to use compulsion if necessary.⁴⁷

⁴⁴ See *Gebr. Eickhoff Maschinenfabrik und Eisengieberei GmbH v. Starcher*, 328 S.E.2d at 504-06; *Volkswagenwerk AG v. Superior Court*, 123 Cal. App. 3d 840, 857-59, 176 Cal. Rptr. 874 (1981).

⁴⁵ In this respect, the instant case differs materially from *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), a case in which this Court upheld a discovery order requiring the Swiss plaintiff to produce documentary evidence located in Switzerland relating to the validity of its claim. In *Societe Internationale*, there was no international agreement such as the Hague Convention that permitted effective discovery of the material sought; to the contrary, production of the information would have violated Swiss law.

⁴⁶ Convention History, *supra* note 10, at 83.

⁴⁷ As a recent report on the Convention by the Permanent Bureau of the Hague Conference observed, "[r]efusals to execute turn out to be very infrequent in practice." Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 17 Int'l Leg. Mat. 1425, 1431 (1978).

In all signatory countries, letters of request may be used to obtain testimony by witnesses.⁴⁸ To be sure, the differing procedures and customs of the various countries may cause the form of the information obtained to differ somewhat from that typical under U.S.-style discovery. For example, in Germany the court will conduct the initial questioning of each witness. But in order to honor its treaty obligation under Article 9 to comply where possible with requests that special methods or procedures be followed,⁴⁹ Germany permits counsel for the parties to examine the witnesses. Upon request, German courts will also authorize verbatim recording of the testimony. In addition, Germany, like all signatory countries, executes letters of request seeking answers to interrogatories or admissions by parties.

⁴⁸ In 1981, for example, the Munich Court of Appeals upheld a decision of the Bavarian Ministry of Justice granting a U.S. letter of request to depose named officers of a German company in connection with a U.S. patent infringement/antitrust action. Court of Appeals (Munich), *Petition for Review of an Administrative Ruling Under Secs. 23 et seq., EGGVG*, Docket No. 9 VA 4/80, reprinted in 20 Int'l Leg. Mat. 1025 (1981). The German court stated in part:

The guiding principle mandating this result is the desire of the Federal Republic of Germany to place judicial assistance with the United States, which previously was carried out only on the basis of comity, on a solid treaty basis, as was done in the Convention on the Taking of Evidence here in question, and thereby also to take due account of the procedural device of 'pre-trial discovery' which is unknown in German procedural law, but no[t] unfamiliar to Germany's treaty partner.

20 Int'l Leg. Mat. at 1036-37.

⁴⁹ See Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters 16, reprinted in 24 Int'l Leg. Mat. 1668, 1674-75 (1985) [hereinafter "1985 Report on Convention Operation"] (signatories have shown "great openness . . . towards admitting application of each other's procedures on their territory . . . the courts in civil law countries generally will allow for depositions to be taken 'common law style' if so requested").

Despite the demonstrated availability of Hague Convention procedures for obtaining information from abroad, some litigants in U.S. courts have raised three objections to using such procedures even as a matter of first resort. These objections are (1) that they will not obtain documents; (2) that using Convention procedures will be costly and/or time-consuming; and (3) that doing so will give foreign litigants an unfair advantage. None of these objections has merit.

With respect to the availability of documents, Germany has exercised its right under Article 23 to limit its obligation to produce documents.⁵⁰ As part of a trend among signatories toward limiting Article 23 reservations,⁵¹ however, the German government has drafted new regulations that would permit pretrial production of specified and relevant documents in response to letters of request.⁵² After comments are received on this draft, the German Ministry of Justice plans to obtain consent from the Bundesrat; the regulations will then go into effect. Moreover, even now (before the adoption of new regulations), German law permits deponents to be questioned concerning the contents of specific documents in executing letters of request pursuant to the Convention.⁵³ And, in any

⁵⁰ 7 Martindale-Hubbell Law Directory, pt. 7, at 16. By ratifying the Convention, the United States accepted the possibility that other signatories might make Article 23 declarations.

⁵¹ See 1985 Report on Convention Operation, *supra* note 49, 24 Int'l Leg. Mat. at 1678 ("[t]he tendency which has appeared since 1978 and which has led a number of States to limit their reservations has gained ground, and the majority of States are now prepared to frame—or, to the extent that they have not yet done so, to limit—their reservations [along lines that permit discovery of specific documents]").

⁵² Such regulations were specifically contemplated by the German statute implementing the Convention. Bundesgesetzblatt 1977 I 3106.

⁵³ In its diplomatic note of April 8, 1986, the Federal Republic of Germany stated that, "[a]lthough the taking of documentary evidence is not yet possible in the Federal Republic of Germany during the pretrial stage, witnesses may be questioned by German

event, litigants in U.S. courts complaining about the Hague Evidence Convention have never explained why their purported inability to obtain information in the form of documents means that they should be entirely excused from seeking information in the form of deposition testimony, answers to interrogatories, and requests for admission—all of which they can obtain through the Convention.

Nor is there anything to suggest that first use of the Convention procedures will generally be more costly or time-consuming for litigants than exclusive use of direct U.S. discovery. To the extent that the Convention is used, lawyer time will simply be spent in discovery under the Convention's rules rather than under federal or state rules.⁵⁴ Moreover, we note that party-controlled discovery under the Federal Rules of Civil Procedure is not known for its expedition or cost-effectiveness.⁵⁵

Finally, we recognize the legitimate U.S. interest in assuring that U.S. nationals enjoy discovery opportunities comparable to those of their foreign adversaries.⁵⁶ But

courts on the contents of documents located in the Federal Republic of Germany to the extent such documents are relevant to the litigation. The practice of substituting the testimony of witnesses for pre-trial production of documents has in the past been used by US parties seeking evidence in the Federal Republic of Germany." Petitioner's Brief in Response to the Solicitor General's Brief for the United States, Nos. 85-98 and 85-99, at 2a. See 1985 Report on Convention Operation, *supra* note 49, 24 Int'l Leg. Mat. at 1674-75; Court of Appeals (Munich), *supra* note 48, 20 Int'l Leg. Mat. at 1037 ("the witnesses named are to be examined with respect to the documents which are identified by date and subject matter as to their origin, content, business purpose and economic impact"); Meessen, *supra* note 19, at 12a-15a (Appendix).

⁵⁴ To the extent the Convention's procedures require parties to formulate their discovery requests more carefully, use of the Convention may actually result in lower costs to U.S. litigants. See Langbein, *supra* note 25, at 846.

⁵⁵ 1980 Amendments to the Federal Rules of Civil Procedure (Powell, J., dissenting), 85 F.R.D. 521 (1980).

⁵⁶ See *Anschuetz*, 754 F.2d at 606; *Messerschmitt*, 757 F.2d at 731; *Graco*, 101 F.R.D. at 521.

this interest does not require U.S. courts to ignore the Hague Evidence Convention; instead they should exercise their ample discretionary powers to control all the discovery in the case in order to assure fairness to both parties. Under the Federal Rules, the court can protect a party from oppressive discovery by its adversary.⁵⁷ For example, should requiring first resort to Hague Convention procedures somehow put one litigant at a discovery disadvantage, the court could postpone that party's obligation to respond to discovery requests in order to prevent any possible unfairness.⁵⁸ By exercising such powers, the U.S. court can easily cope with the unusual case in which first use of Hague Convention procedures might disadvantage one of the litigants vis-a-vis the other.⁵⁹

2. *First Use of the Hague Convention Substantially Accommodates Foreign Sovereign Interests.*

It should be apparent that, when U.S. courts need information from a country that objects to U.S.-style discovery, first use of the Hague Convention will respect that country's sovereignty to a much greater degree than an approach that ignores the Convention. Signatory countries have consented to the use of Convention procedures and have bound themselves to honor such requests. Nevertheless, the court of appeals in this case and several other federal courts have somehow persuaded themselves that first use would be insulting to foreign governments.⁶⁰

The best evidence of foreign government sensibilities is the statements of foreign governments themselves—in this

⁵⁷ Fed. R. Civ. P. 26(c)(2)-(4) (court may "make any order which justice requires" to limit discovery, including an order permitting discovery only on specified terms and conditions, or by a different discovery method, or limited in scope to certain matters).

⁵⁸ Fed. R. Civ. P. 26(c)(2) (court's protective order may designate time at which discovery may be had).

⁵⁹ Wright & Miller, 8 *Federal Practice & Procedure* § 2040 (1970 & 1986 Supp.).

⁶⁰ Pet. for Cert. 7a; *Anschuetz*, 754 F.2d at 613; *Graco*, 101 F.R.D. at 523-24; *Murphy*, 101 F.R.D. at 361 n.2.

case and elsewhere—rather than the unsupported surmises of U.S. courts. At the 1985 conference on the operation of the Hague Evidence Convention, for example, the German official representatives stated that “[w]here the court of a Contracting State orders witnesses or documents to be produced in its own country, the Convention, though not exclusive, should be first applied, before recourse may be had to that court’s own, non-treaty rules for the taking of evidence abroad.”⁶¹

Even if use of the Convention is followed by discovery orders pursuant to the Federal Rules, as discussed in Part C *infra*, foreign sovereign interests will be served by the use of the Convention.⁶² First, review of evidence provided through the Convention will permit the parties and the court to ascertain what other evidence located abroad is truly necessary for the litigation. This process is likely to narrow the scope of the discovery dispute. There will be less intrusion on foreign sovereignty if discovery is limited to what a U.S. court has determined, or the parties have agreed, to be truly necessary.

Second, in assessing what is truly necessary, the U.S. court and the parties will have the benefit, pursuant to Article 13 of the Convention, of the foreign central authority’s or court’s reasons for objecting in whole or in part to a letter of request. As this Court has recently noted, federal judges have “little competence in determining precisely when foreign nations will be offended by particular acts.”⁶³ Providing a channel of direct communication from the foreign nation to the U.S. court on the particular issues of the case will provide at least a partial solution, if this Court makes clear that U.S. courts should give foreign explanations the respectful attention that comity requires.

⁶¹ 1985 Report on Conference Operation, *supra* note 49, 24 Int’l Leg. Mat. at 1678; see Brief for the Federal Republic of Germany as Amicus Curiae, No. 85-98, at 7-9.

⁶² Cf. Meessen, *supra* note 19, at 30a (Appendix).

⁶³ *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. at 194.

3. *First Use of the Hague Convention Promotes the Development of the International Legal System.*

Use of the Convention for extraterritorial discovery also promotes the mutual interest of the United States and its treaty partners in a smoothly functioning international system for resolving disputes that cross national borders.⁶⁴ The values served by such a system include predictability, fairness, reciprocity, mutual respect for sovereignty, and ease of commercial intercourse.⁶⁵ A rule requiring first use of the Convention would tend to redirect extraterritorial U.S. discovery into an internationally accepted channel. It would promote reciprocal communication between foreign and U.S. authorities about the nature of their competing policies and interests concerning discovery and thus tend to reduce or eliminate conflicts between those interests. First use of the Convention would avoid foreign parties’ perceptions of unfairness and the stormy confrontations that have resulted when the U.S. courts show no respect for interests safeguarded by foreign legal regimes. These results would clearly benefit the international legal order as well as the interests of nations, courts and litigants in particular cases.

More widespread use of Convention procedures would make it possible to realize the Convention’s full potential for “improv[ing] mutual judicial cooperation.”⁶⁶ In *Mitsubishi v. Soler*, this Court observed that “the potential of [international arbitral] tribunals for efficient disposition of legal disagreements . . . has not yet been tested.”⁶⁷ This is equally true of the Hague Evidence

⁶⁴ In addition, as explained by Professor Meessen in his opinion, *supra* note 19, at 18a-21a, 29a-31a (Appendix), first use of Convention procedures avoids violation of the international law doctrines underlying U.S. principles of comity.

⁶⁵ See *supra*, note 37. See, e.g., Maier, *Extraterritorial Jurisdiction At a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int’l L. 280, 303-04, 315 (1982); *Restatement (Second) of Conflict of Laws* § 6, comment d (1971).

⁶⁶ Recitals, Hague Evidence Convention.

⁶⁷ 105 S. Ct. at 3360.

Convention. Although courts in civil law countries routinely use the Convention to obtain evidence in the United States and elsewhere, U.S. courts and litigants have hitherto been reluctant to forgo standard U.S. discovery rules and proceed under the now unfamiliar Convention procedures. U.S. courts have only issued 181 letters of request to German courts since the Convention came into force in 1979, compared to the 188 requests issued by German authorities to U.S. officials in 1985 alone.⁶⁸ If the Convention is "to take a central place in the international legal order,"⁶⁹ performing its intended role of bridging the gap between civil law and common law systems,⁷⁰ then U.S. courts must follow a first use rule and use the Convention to the fullest extent.

4. This Court Should Set Forth a General Rule that Hague Convention Procedures Should Be Exhausted.

As set forth above, the interests of the U.S. litigant, the foreign sovereign, and the international system can best be accommodated in the present case if the procedures of the Hague Evidence Convention are exhausted before other means of discovery are explored. This conclusion does not depend on facts peculiar to this case.

In the vast majority of cases involving discovery of information from the territory of a signatory to the Convention, the facts relevant to the first use question will be the same: (1) a party to U.S. civil litigation seeks information located outside the United States; (2) an opposing foreign litigant objects to the breadth and the intrusiveness of U.S. discovery techniques for obtaining that information; (3) the country where the evidence is located considers its sovereignty violated by the use of standard U.S. discovery methods to obtain information

⁶⁸ Statistics provided by Dr. Christof Boehmer, Federal Ministry of Justice, Bonn, Federal Republic of Germany.

⁶⁹ *Mitsubishi v. Soler*, 105 S. Ct. at 3360.

⁷⁰ Convention History, *supra* note 10, at 55, 83.

located within its territory;⁷¹ and (4) Hague Convention procedures are likely to yield information useful to the party seeking the foreign discovery. Accordingly, this situation is one like those described above⁷² where the principle of comity generates a rule—here the rule of exhaustion, or first use, of Hague Evidence Convention procedures for extraterritorial discovery in civil cases.

Moreover, there are powerful practical considerations supporting the announcement of a first-use rule. Experience has shown that many trial courts give short shrift to legitimate foreign interests when faced with requests to use Hague Evidence Convention procedures. Such courts not surprisingly turn to the more familiar procedures established by their own local rules.⁷³ Moreover, erroneous discovery decisions by U.S. trial courts cannot adequately be corrected on a case-by-case basis by the appellate courts, because of limitations on appellate review of interlocutory discovery decisions.⁷⁴

Under the circumstances, any "futility" exception to the first use rule must be narrowly circumscribed so as not to undermine the rule itself. This Court should require the litigant seeking extraterritorial discovery to

⁷¹ Some countries have enacted blocking statutes; others such as Germany have made their objections clear through diplomatic notes and amicus briefs in U.S. litigation. *See supra*, notes 7 and 8. This Court should accord equal respect to both methods. A ruling that gives special deference to countries that have enacted blocking statutes is likely to heighten the level of international confrontation by inducing additional countries to enact such statutes.

⁷² *See supra*, notes 38-43 and accompanying text.

⁷³ *See, e.g., Messerschmitt*, 757 F.2d at 731; *Murphy*, 101 F.R.D. at 363; *Lasky v. Continental Prods. Corp.*, 569 F. Supp. 1227, 1228 (E.D. Pa. 1983). *See generally, Oxman, The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad*, 37 U. Miami L. Rev. 733, 741-42 (1983); *Maier, supra* note 65, at 317.

⁷⁴ *See Kerr v. United States*, 426 U.S. 394, 402 (1976); *see also Boreri v. Fiat S.P.A.*, 763 F.2d 17, 20 (1st Cir. 1985) (refusing to review district court decision involving extraterritorial discovery).

make a strong showing to justify bypassing the Convention's procedures. For example, it should not be enough for the litigant to show that use of the Convention would provide information in a different form than would U.S. discovery methods (*e.g.*, testimony or answers to interrogatories or requests for admissions rather than production of documents). The focus should at all times remain squarely on whether any useful information about relevant issues is available through the Convention. It will only be in rare cases that no useful information whatever can be obtained through the first use of the Convention.

C. If Convention Procedures Do Not Produce Satisfactory Discovery, Then the U.S. Court Should Order Direct Discovery under Federal or State Rules Only Where There Is No Alternative If Justice Is To Be Done Between the Parties.

Once the receiving state's court has responded to a Hague Evidence Convention request, the party seeking discovery may well be satisfied with the information provided. If, however, the party seeks further discovery not available through Convention procedures, the U.S. court will then decide, in light of the principle of international comity, whether to enforce U.S.-style discovery by issuing discovery orders to produce information located abroad. At this stage, unlike the initial stage, no general rule can be laid down in advance. The court must apply a comity analysis to the precise facts and circumstances of the individual case.

As at the first stage and for the same reasons, foreign sovereign interests—now clearly articulated by the foreign court or central authority—will weigh strongly against ordering discovery under U.S. procedures. The U.S. interests in doing so, on the other hand, may be stronger than at the initial stage, because Convention procedures have not provided fully satisfactory discovery. Even so, these U.S. interests will frequently be insufficient to justify direct discovery orders. For example, the infor-

mation sought may be available from sources in the United States, or it may not be "necessary to the action . . . and directly relevant and material."⁷⁵ Alternatively, it may be possible to vindicate the interest of the party seeking extraterritorial discovery merely by drawing the logical adverse inference from the foreign party's failure to produce specific information on a contested issue. The U.S. court should not compel production of information from the territory of a foreign nation objecting to such production unless the U.S. litigant demonstrates that there is no alternative if justice is to be done between the parties. Even then, the court should narrowly tailor its discovery order to avoid unnecessary intrusion on foreign interests.⁷⁶

⁷⁵ See *Restatement (Revised) of Foreign Relations Law of the United States* § 437, comment a (Tent. Draft No. 7, April 10, 1986).

⁷⁶ See Oxman, *supra* note 73, at 784 *et seq.*

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

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APPENDIX

APPENDIX

Karl M. Meessen ¹

March 31, 1986

THE ANSCHÜTZ AND MESSERSCHMITT OPINIONS
THE INTERNATIONAL LAW ON
TAKING EVIDENCE FROM, NOT IN,
A FOREIGN STATE:

OF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.²

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² *In re Anschuetz & Co. GmbH*, 754 F.2d 602 (5th Cir. 1985); *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985). Upon petitions for certiorari, both cases are presently pending before the United States Supreme Court. The following opinion has been prepared in view of those proceedings at the request of Gerling-Konzern Allgemeine Versicherungs-Aktiengesellschaft, Cologne, Federal Republic of Germany. Gerling is the insurer of product liability risks to both petitioners.

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I. Summary

As indicated by diplomatic interventions of the German, British and French governments, the Anschütz and Messerschmitt cases raise serious issues of international law. From the point of view of international law, the opinions below can in fact not be upheld. Correction may result from applying U.S. procedural law in conformity with international law as the law of the land, or preferably, from reconsidering the application of comity under U.S. law in a manner that is in accordance with the underlying rule of international law. If, for whatever reason, conformity with international law is not reached, the U.S. would be liable towards Germany under the international law of responsibility.

The relevant rule of international law does not directly derive from the Hague Evidence Convention which is inconclusive as to its relation to such domestic procedures of taking evidence as are under review here. But the Convention or, more precisely, the availability of Convention procedures is of indirect importance under the controlling rule of customary international law which is: In exercising its procedural jurisdiction, a state has to accommodate conflicting foreign state interests, especially by adopting compromise solutions designed to reconcile domestic and foreign interests.

The foregoing rule reflects the common denominator of views, held in practice and legal doctrine, on the broader problem of extraterritorial jurisdiction. Causing the transfer of evidence from a foreign state to be produced before domestic courts is an instance of exercising extraterritorial jurisdiction.

To apply that rule of customary international law, an assessment of German and U.S. interests has to be made not unlike applying comity principles under U.S. law. In doing so, two factors which, it is submitted, the court below failed to understand have to be taken into consideration:

(1) Germany's interest in the protection of its judicial sovereignty would be seriously affected if evidence were removed from German territory as a result of U.S. court orders to that effect. Parties and witnesses residing in Germany are, under the German constitution, entitled to expect the taking of evidence to be operated by German courts.

(2) The U.S. has an interest in granting plaintiffs before U.S. courts access to the necessary evidence even as regards foreign defendants controlling evidence located abroad. But that interest may well be served by first taking recourse to Convention procedures which, as German-U.S. practice of legal assistance has demonstrated, offer access to the contents of documents even at the pretrial stage so that the production of documents themselves could be ordered for trial.

In reconciling those interests, the above rule of customary international law requires plaintiffs to proceed as follows: In the present first phase of litigation, plaintiffs have to use the channels of the Convention. If, contrary to experience, plaintiffs still need further evidence to prepare trial, there is time for U.S. courts, in a second phase, to come back to the question of ordering, at the request of plaintiffs, the transfer of evidence from Germany to the U.S.

II. The International Law Issues in *Anschütz* and *Messerschmitt*

In both *Anschütz* and *Messerschmitt*, product liability suits have been brought against the German manufacturers of boat steering devices (*Anschütz*) and of helicopters (*Messerschmitt*). Defects of an *Anschütz* steering device allegedly contributed to the collision of a Spanish owned vessel with a ferry landing at the mouth of the Mississippi River, causing damage to the landing and several other boats. Defects of a *Messerschmitt* helicopter allegedly contributed to a crash, near McKinney, Texas, in April 1982, causing the death of three occupants.

The district courts, finding to have personal jurisdiction over the respective defendant, ordered the production of documents located in Germany and the deposition of some of each defendant's employees also located in Germany. According to the *Anschütz* opinion, the evidence is to be taken in the United States "[i]f *Anschütz* is not voluntarily forthcoming in Germany."³ In *Messerschmitt*, that condition already formed part of the opinion of the district court which was confirmed by the court of appeals.⁴

Both cases are not on taking evidence in a foreign state. They are on taking evidence from a foreign state. The witnesses and the documents would have to be transferred from Germany to the United States for the purposes of taking evidence in the United States. If the court orders were to be confirmed, the German defendants would, in case of non-compliance, face sanctions which could be enforced within U.S. territory as long as the defendants own property there. The enforceability of the U.S. orders is not open to doubt. The question, however, is whether ordering the transfer of the evidence is in conformity with international law.

International law comes in as treaty law. The Federal Republic of Germany and the United States of America are both parties to the Convention on Taking Evidence Abroad in Civil or Commercial Matters which was signed at the Hague on March 18, 1970 and which is, therefore, often referred to as the Hague Evidence Convention. The court of appeals denied the Convention to have an impact on the application of the U.S. Federal Rules of Civil Procedure. That conclusion will be re-examined under the aspect of treaty law in Section III of this opinion.

³ *Anschütz*, at 615.

⁴ *Messerschmitt*, at 730.

Customary international law comes in as well. Causing conduct in Germany, that is causing the transfer of evidence that would in Germany be exclusively for German courts to order, may have affected Germany's judicial sovereignty. The court of appeals, applying comity principles of U.S. law, did not find an infringement of German sovereignty as long as the evidence was not actually taken in Germany without German consent. Whether the mere absence of physical intrusion really removes the possibility of any violation of customary international law protecting German sovereignty, will be discussed in Section IV.

A violation of customary international law, as it will indeed be established, may be avoided by reconsidering the application of comity principles of U.S. law. A short observation to that effect in Section V will conclude the opinion.

It may be noted at this point that the violation of the customary international law rule protecting German sovereignty could only have been waived by Germany itself and not by any of its nationals.⁵ Far from waiving any right, the German government intervened as *amicus curiae* in *Anschütz*, which came to be considered the lead case, and voiced protests on the diplomatic level. The international law issue has not become moot.

III. Treaty Law: The Hague Evidence Convention

The Hague Evidence Convention entered into force for the Federal Republic of Germany on June 26, 1979.⁶

⁵ For a similar view cf. *Pierburg GmbH and Co., KG v. Superior Court of Los Angeles County*, 186 Cal. Rptr. 876, at 882 (1982); *Coopers Industries Inc. v. British Aerospace Inc.*, No. 83 Civil 6366 (DNE) (S.D.N.Y. 1984).

⁶ Bekanntmachung über das Inkrafttreten des Haager Übereinkommens über die Beweisaufnahme im Ausland in Zivil- oder Handelssachen vom 21. Juni 1979, Bundesgesetzblatt 1979, Teil II, 780.

As of that date, the Convention is binding upon both states involved in the present dispute since the U.S. had already become a party to the Convention as of October 7, 1972.⁷ In the following, the availability of procedures of taking evidence in Germany under the Hague Evidence Convention (Convention procedures) will be discussed at first (Subsection 1). Afterwards the discussion will turn to the question of whether the availability of Convention procedures is in any way limiting access to U.S. procedures of taking the evidence from Germany (Subsection 2). The analysis will be conducted as a matter of treaty interpretation only. The impact which the availability of Convention procedures may have under customary international law or under U.S. law will be examined in Section IV and V respectively.

1. Availability of Convention Procedures

In *Anschütz*, the court of appeals stated: "The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules."⁸ This is correct but beside the point: It is correct that the Hague Evidence Convention provides for various procedures of taking evidence in a foreign state, while no procedures of taking evidence from a foreign state are provided for under the Convention. Yet the question is whether Convention procedures, if available, should be used instead of taking recourse to U.S. procedures to transfer to the U.S. witnesses residing in Germany and documents located in Germany. The whole argument depends on whether Convention procedures are indeed available in the instant cases. That question will, therefore, have to be examined before any conclusions could be drawn regarding the impact on access to U.S. procedures. Availability of convention procedures is, in

⁷ 23 U.S.T. 2555, T.I.A.S. No. 7444.

⁸ *Anschütz*, at 615.

this context, understood to signify first that the convention is applicable at all and second that its procedures are suited to produce the evidence sought for in the particular case.

The applicability of the Convention follows from just one requirement: The presence of a civil or commercial matter. The instant claims for damages, based on product liability, qualify as such civil or commercial matter. In that respect, the court of appeals rightly expressed no doubt in either case.

The passage from Anschütz quoted above and some accompanying language could be understood to deny the applicability of the Convention whenever the domestic court finds personal jurisdiction over a party-witness. The Convention, however, does not make the absence of personal jurisdiction a requirement of its applicability. From the U.S. law point of view, Bernard H. Oxman argued: "The decision to assert in personam jurisdiction over a foreign defendant in a civil action does not, and should not, involve a detailed enquiry as to the reasonableness of subjecting that person's property, employees, and affiliates throughout the world to the compulsory power of the court."⁹ From the point of view of international law, as may be added, limiting the applicability of the Convention to cases in which municipal law does not extend in personam jurisdiction to the respective witness would hardly make sense. There may well be situations in which evidence located abroad could only be reached through the channels of the Convention even though personal jurisdiction may be present, e.g. when a sanction could not be enforced for lack of property located within the state attempting to take the evidence.

⁹ Bernhard H. Oxman, *The Choice between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention*, 37 *UnivMiamiLRev* 733, at 740 (1983).

In Anschütz and Messerschmitt, the Convention is brought into play by the foreign location of the information on the products in question. The practical availability of such procedures, however, will have to be assessed in some detail, first regarding the depositions demanded by plaintiffs (Subsection 1 a) and then regarding the orders for the production of documents (Subsection 1 b).

a) The Taking of Depositions

In both cases, plaintiffs are requesting the deposition of expert witnesses belonging to the personnel of the defendant manufacturer. Could such depositions be handled through the channels of the Convention? That question does not relate to the procedures of taking of evidence "without compulsion" by diplomatic officers under Chapter II of the Convention.¹⁰ In view of the objections raised by Anschütz and Messerschmitt, it only relates to legal assistance under Chapter I of the Convention. In proceeding under Chapter I, the following points have to be considered:

Letters of request may under Article 1 (2) "not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated." That requirement seems sufficiently broad to cover even requests for discovery at the pretrial stage if the discovery is at all directed towards the objectives of the pending action. It may be assumed that the district courts ordering the discovery made sure of that requirement to have been met.

Article 3 of the Convention sets forth a number of formal requirements for specification of the request. Un-

¹⁰ In addition to the Convention, see German note to U.S. Embassy in Bonn of October 17, 1979, and U.S. note to German Foreign Office of February 1, 1980, both published in: Bruno A. Ristau, *International Judicial Assistance (Civil and Commercial)*, vol. II, at C I-78 et seq.

der that provision, U.S. judges may find themselves in a situation not familiar to them when having to specify the necessary evidence at a very early stage of the proceedings. Such scrutiny appears to be the price the U.S. had to pay for having its system of discovery included into a convention only dealing with the taking of evidence in its more narrow meaning. To provide that specification does not place an undue burden on U.S. courts. In practice, pretrial conferences might serve as an appropriate institutional framework.

Under Article 9 (1) of the Convention, Germany is, when executing a letter of request, entitled to apply its own procedural law regarding the form of taking the evidence. But at the request of the U.S., Germany would have to adapt its procedures to U.S. procedures unless entirely impractical or prohibited by German law (Article 9 (2)). Thus a German court would take verbatim records instead of having the judge summarize the statement made by the witness as is usual practice in Germany.

To be sure, Article 11 (1)(a) retains to witnesses deposed in Germany all the privileges of German law. In the instant cases, it is difficult to predict whether any of the grounds for refusing to testify as listed in Sections 383 and 384 of the German Code on Civil Procedure could become relevant. But, even if, for instance, an employee should under those provisions refuse to answer a specific question arguing that the answer might be evidence in support of claims against the witness himself, such refusal would be a significant fact allowing the U.S. court to draw its own conclusions. The protection of business secrets under Section 384 no. 3 of the German Code on Civil Procedure is usually construed narrowly. Whether it could bar disclosure of information regarding products manufactured quite some time ago, as was the case in *Anschütz* and in *Messerschmitt*, is doubtful. Prod-

uct liability suits before German Courts are nothing out of the ordinary.

Finally, Article 12 (1) (b) authorizes Germany, being the requested state in the instant cases, to refuse to execute an eventual letter of request, if it "considers that its sovereignty or security would be prejudiced thereby." Neither product seems to be particularly sophisticated as to qualify as a matter of German security, and Germany could surely not invoke its "judicial" sovereignty when asked to execute a letter of request under a binding international treaty. Nor did the German government refer to any other element of its sovereignty as being affected.

To sum up, a request for the taking of depositions in Germany has a fair chance of being executed once the requesting courts make sure that questions to witnesses be specified in an adequate manner. Such prognosis seems confirmed by the astonishing extent to which Convention procedures have been used in German-U.S. practice shortly upon the Convention's entry into force: According to information supplied by the German Government in its amicus brief, 151 requests from U.S. courts were received in Germany during the period of 1979 to 1984. 131 of these requests were accepted and executed. Most of the 20 requests which were rejected either did not sufficiently identify the evidence to be taken or were for production of documents at the pre-trial stage.¹¹

¹¹ *Anschütz and Co. GmbH v. Mississippi River Bridge Authority, et al.*, No. 85-98, Supreme Court of the United States, Petition for writ of certiorari, Brief for the Federal Republic of Germany as amicus curiae of August 1, 1985; a scholarly investigation, privately undertaken for the same period, revealed a lower total, but about the same proportion of requests granted in relation to requests denied: 63 to 12 (Harald Koch, *Zur Praxis der Rechtshilfe im amerikanisch-deutschen Prozessrecht, Ergebnisse einer Umfrage zu dem Haager Zustellungs- und Beweisübereinkommen*, 5 *Praxis des Internationalen Privat- und Verfahrensrechts*, 245, at 247 (1985)).

b) The Production of Documents

In both cases, orders of taking evidence by way of production of documents were approved by the court of appeals. Could those orders be channeled through the Convention procedures as well?

Among the 17 contracting states (by the end of 1984), Germany is one of the 13 states to have made a declaration under Article 23 of the Convention to the effect that execution of letters of requests "issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries" is severely restricted or excluded altogether. Germany, indeed, unmistakably declared: "Requests for judicial assistance having as their object a procedure as defined in Article 23 of the Convention will not be executed."¹² In addition, the Federal Minister of Justice was authorized to adopt, with the consent of the Federal Council, a representation of Länder governments serving as a second chamber of parliament, a regulation providing for the execution of such requests to the extent that "they do not violate basic principles of German procedural law, and . . . that the legal interests of the individual involved are taken into account."¹³ Such regulation not yet having been adopted, requests for the production of documents in *Anschütz* and *Messerschmitt* would not be executed at the present pretrial stage of the proceedings.

The practical impact of the foregoing conclusion, however, has to be seen in the light of two alternatives to requests for the production of documents at the pretrial stage: Such requests could be substituted by depositions to be taken at the present pretrial stage, or the production of documents could be requested later at the trial stage of the proceedings. Both alternatives merit further exploration.

¹² Bundesgesetzblatt 1977 Teil II, 3105, as translated by Bruno A. Ristau (note 10), at CI-84.

¹³ *Id.*, note 12.

In German court practice, it is common to hear witnesses as to the contents of special documents they have access to. For most practical purposes, therefore, a request for production of documents may be replaced by a request for deposing a witness on questions such as the minutes of meetings, the contents of instructions or even on possible defects of a product as established by blueprints and their alterations. In formulating the requests and in using the evidence, U.S. courts are asked for considerable adaptation to Convention procedures. But "accommodation of the different methods" of taking evidence is what the Preamble of the Hague Evidence Convention says international legal assistance is about. Such adaptation emanates from the legal obligation to implement the Convention and therefore has to be included into any assessment of what constitutes "best evidence" from the point of view of U.S. law.

Above all, substituting documentary evidence by depositions at the pretrial stage has stood the test of German-U.S. practice. The Permanent Bureau to the Hague Convention on Private International Law stated in its report on the operation of the Convention: "The decision of the Oberlandesgericht (Higher Regional Court) Munich of 27 November 1980 . . . illustrates that even where the requested state, as in the case of the Federal Republic of Germany, has made an absolute reservation under Article 23, it may be possible to obtain information on documents which themselves could not be surrendered or produced, by way of the compulsory examination of third persons as witnesses concerning the contents of those documents."¹⁴ In that case, the Bavarian Minister of Justice decided, on the one hand, to decline a request for

¹⁴ Hague Conference on Private International Law, Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Prepared by the Permanent Bureau, July 1985.

the production of documents and, on the other hand, to grant a request for depositions. The decision of the Minister of Justice was confirmed on both counts by the Oberlandesgericht.¹⁵ Counsel for the party seeking the evidence later reported "that the depositions could be taken only with respect to the material listed in the document request, even though the document request had been denied" and summarized his report by stating: "All things considered, the German depositions in the end worked out rather well."¹⁶

Requests for the production of documents at the trial stage will, unlike those at the pretrial stage, be entertained by Germany according to the general conditions set forth above regarding the deposition of witnesses. As a result, documents would have to be sufficiently specified to conform with Article 3 of the Convention. Yet a careful handling of depositions at the pretrial stage would enable one to be reasonably specific. No further adjustment of U.S. trial procedures seems required. Plaintiff would, as a result of pretrial depositions, have sufficient knowledge regarding the contents of the documents as to be able to decide on having them produced during trial. Such production of documents could, under Article 23 of the Convention and under the respective German declaration, be ordered well ahead of trial as long as such order would not have to be implemented before trial actually begins.

While it is true, therefore, that Germany would not execute a request for production of documents at the present stage, the unavailability of that particular means of evidence is offset by the availability of two other Con-

¹⁵ OLG München, Decisions of October 31, 1980 and of November 27, 1980, 9 VA 3/80 and 4/80, 20 International Legal Materials 1025, 1049 (1981).

¹⁶ Charles Platto, Taking Evidence Abroad for Use in Civil Cases in the United States: A Practical Guide, 16 International Lawyer 575, at 584-585 (1982).

vention procedures: extending depositions to the contents of the documents and postponing the production of documents to the trial stage. The Superior Court of New Jersey was right when it observed in *Vincent v. Motobecane*: "Moreover, if Vincent (scil. when using Convention procedures) is denied access to the actual documents themselves, it may still be able, even without them, to obtain the technical and commercial information it seeks."¹⁷

2. Inconclusiveness of the Convention as to its Relation to Domestic Procedures.

Having established that Convention procedures are indeed available for the purpose of taking evidence in the two instant cases, it may now be asked how the Convention rules on its relation to such domestic procedures as presently under review. Is the Convention exclusively applicable whenever its procedures are available? Does the Convention offer an option in addition to the availability of domestic procedures? Or does the Convention constitute the primary way of taking the evidence necessary in a particular lawsuit?

The Convention is on "the taking of evidence abroad." Its text does not seem to side with any of the above, nor any additional, alternatives. Under Article 27 of the Convention, contracting states are not prevented from "permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." That clause should not be misread to relate to the internal law or practice of the requesting state. It merely states the obvious: The requested state may be more generous than provided for under the Convention and is free to grant assistance under Chapter I of the Convention or to permit the taking of evidence by diplomatic officers under Chapter II of the Convention in

¹⁷ *James Vincent et al. v. Ateliers de la Motobecane S.A.*, 475 A.2d 686, at 690 (N.J.Supp.A.D. 1984).

greater breadth than the contracting parties were prepared to commit themselves to by treaty obligation.¹⁸

The parallel treaty, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965, states in its Article 1(1): "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."¹⁹ In *Anschütz*, the court of appeals interpreted that clause to provide for the exclusiveness of the Service Convention in contrast to the Evidence Convention.²⁰ That is correct as regards serving documents abroad, but not as regards bringing about the same effect by domestic service, e.g. by publishing an announcement in the official journal to effectuate service against persons residing abroad. The German government, when submitting both Conventions to the Federal Diet, for parliamentary consent, clearly stated that such other methods of bringing service to persons living abroad had not been ruled out.²¹ To the question under review here, it is of no significance, therefore, that the Evidence Convention does not contain a provision similar to Article 1(1) of the Service Convention.

The text of the Hague Evidence Convention not being just ambiguous but silent, there is no room for using imaginative techniques of interpretation. The Convention does not answer any of the above questions. It remains

¹⁸ For the same view cf. e.g. *Philadelphia Gear Corp. v. American Pfauter Corp. et al.*, 100 F.R.D. 58 (E.D. Pa. 1983); Comment, *the Hague Convention on the Taking of Evidence Abroad In Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 UPaLRev 1461, at 1476 (1984).

¹⁹ 20 U.S.T. 361, T.I.A.S. No. 6638, Bundesgesetzblatt 1977 Teil II 1453.

²⁰ *Anschütz*, at 615.

²¹ Bundesregierung, Denkschrift zu den Übereinkommen, Bundestags-Drucksache 8/217, 38, at 40-41 (1977).

inconclusive. Its relation to domestic procedures will have to be derived from a rule of law separate from the Convention itself. The respective rule of customary international law will be for the next section of this opinion to establish.

IV. Customary International Law: The Protection of State Sovereignty.

Amicus briefs and diplomatic notes accompanying litigation before municipal courts signalize issues of extra-territoriality affecting state sovereignty. In fact, it was such reactions of foreign governments that gave rise to a give and take between the states which developed patterns of statute practice eventually to grow into rules of customary international law protecting state sovereignty.

In *Anschütz*, the court of appeals was by no means unsensitive to the international dimension of the case. It invited the German government and the U.S. Department of Justice to state their views, and, in its opinion, it subscribed to the need of avoiding "any infringement upon German sovereignty."²² The court, however, could not find an infringement unless the evidence were taken in Germany. Similarly, in *Messerschmitt*, the court first acknowledged Germany's legitimate concern, but was then satisfied to find the balance of comity considerations to be in favor of the U.S. since the order for the production of documents would not require "any governmental action in Germany," and as to the expert witnesses, comity principles were, in the court's view, not implicated at all.²³

In the following, the discussion will focus first on establishing the rule of customary international law on the protection of state sovereignty when evidence is taken from abroad (Subsection 1). Thereafter that rule will be applied to the facts of the *Anschütz* and *Messerschmitt* cases (Subsection 2).

²² *Anschütz*, at 615.

²³ *Messerschmitt*, at 732-33.

1. Accommodating Conflicting Interests of Foreign States.

Taking evidence from a foreign state, rather than in a foreign state, is just one instance of the general problem of extraterritorial jurisdiction: Respecting the physical integrity of foreign territory, but causing conduct in foreign territory by way of domestic measures. In the case of taking evidence it is the domestic courts that order such foreign conduct, to wit, making a witness travel to domestic territory or collect documents and take them to domestic territory for production there.

The international law on extraterritorial jurisdiction as it developed in the fields of antitrust law, security exchange control law, export control law, etc. could not precisely be called well settled. Some basic tenets, however, are no longer controversial:

- (1) Causing extraterritorial effects is not generally prohibited. Matters for regulation are trans-territorial in nature and could not be split up and apportioned to the exclusive jurisdiction of the respective states.
- (2) Causing extraterritorial effects is not generally permitted either. A free-for-all of extraterritorial regulation would, by establishing conflicting demands, disorientate decision-making of individuals and create general chaos.
- (3) Exercising extraterritorial jurisdiction is in conformity with international law if the foreign state where the extraterritorial effects are to occur is, neither generally nor in the particular case known to be objecting.

What is the law when the foreign state, as in the instant cases, does raise objections? The general principle of sovereign equality demands, and the overall record of state practice confirms: Conflicting interests of foreign states have to be accommodated, especially by

adopting compromise solutions; if no compromise solution can be found, states are not permitted to take such measures as would cause greater harm to foreign interests than do good for domestic interests.

To what extent a state is obligated to defer to greater interests of foreign states may still be a matter of controversy. The first draft of the Restatement of Foreign Relations Law (Revised) was very vague in that respect when it stated in § 403 (3): ". . . Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of the factors listed in Subsection (2)." ²⁴ Yet the latest draft, to be submitted for final approval at the Institute's Annual Meeting in May 1986, contains the following new text of § 403 (3): "(3) When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction in light of all the relevant factors, including those set out in Subsection (2), and should defer to the other state if that state's interest is clearly greater." ²⁵ In the opinion of this writer, the last part of the provision would have to read: ". . . each state has an obligation . . . to defer to the other state if that state's interest is greater." ²⁶ There is, however, no need to elaborate on the evidence for that thesis here since the first part of the above rule, regard-

²⁴ The American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised), Tentative Draft No. 2 (1981).

²⁵ The American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised), Final Draft, to be published shortly.

²⁶ Cf. Karl M. Meessen, Antitrust Jurisdiction Under Customary International Law, 78 AmJInt'lL 783 (1984); idem, Extraterritoriality of Export Control: A German Lawyer's View of the Pipeline Case, 27 German Yearbook of International Law 97 (1984).

ing the accommodation of interests of foreign states, suffices to deal with the instant cases at this stage as will be shown in Subsection 2 of this Section.

The international law obligation to accommodate interests of foreign states has, probably for the first time, been formulated in § 40 of the Second Restatement of Foreign Relations Law in 1965. There, in cases of concurrent jurisdiction of two or more states, each state was stated to be "required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states."²⁷ In the meantime, U.S. courts, partly relying on U.S. law principles of comity, have brought ample proof of both the existence and the practical operability of the rule.²⁸ The final decision in *Timberlane* of 1984²⁹ confirmed the rule, and the 1984 decision of the Court of Appeals for the District of Columbia Circuit in *Laker*³⁰ is not to the contrary since the limitations to the application of comity mentioned there leave unaffected the obligation to accommodate such foreign interests as are not "fundamentally prejudicial to those of the domestic forum."³¹

²⁷ The American Law Institute, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

²⁸ Cf. e.g. Restatement in the Courts, Cumulative Annual Pocket Part For Use In 1985-1986, Reporting All Cases Through June 1984 that cite Restatement of the Law, Second, Foreign Relations Law of the United States, at 61 et seq. (1985).

²⁹ *Timberlane Lumber Co., et al. v. Bank of America N.T. & S.A. et al.*, 749 F.2d 1378 (9th Cir. 1984), cert. denied, 105 S.Ct. 3514 (1985).

³⁰ *Laker Airways Limited v. Sabena, et al.*, 731 F.2d 909 (D.C. Cir. 1984).

³¹ *Laker v. Sabena* (note 30), at 937; for a general evaluation of the *Laker* opinion cf. Meessen, Antitrust Jurisdiction (note 26), at 786 et seq., 801 et seq.

In the Restatement of Foreign Relations Law (Revised), the accommodation of foreign interests has been included into the broader principle of "reasonableness" which states as an international law obligation to evaluate i.a. "The likelihood of conflict with regulation by other states."³² Even the Court of Appeals for the Fifth Circuit, as may be gathered from its reference to comity,³³ does not seem to be objecting to the existence of an obligation to accommodate foreign state interests. But, in cases on the taking of evidence "from, not in, a foreign state," the court seemed determined never to find any need for such accommodation since effects on foreign sovereignty were practically ignored. It is this application of the rule that was inadequate as will be demonstrated in the following subsection.

2. Applying the Rule on the Accommodation of Foreign Interests.

The international law rule again is: In exercising jurisdiction, a state has to accommodate conflicting interests of foreign states, especially by adopting compromise solutions.

To the American reader, applying that rule will very much look like applying comity principles of U.S. law. Both rules are in fact interrelated: The state practice underlying the international law rule substantially draws from U.S. case law developed under comity considerations, and that case law may, as will be shown in the next Section, continue to be applied if kept short of an infringement of international law.

To apply the international law rule, it is suggested to start by assessing foreign, i.e. German, interests (Subsection 2 a), then to proceed to an assessment of U.S. interests (Subsection 2 b), and finally to discuss an ac-

³² The American Law Institute (note 28), § 403 (1) and (2) (h).

³³ See above notes 22 and 23.

commodation of the interests of the two states involved (Subsection 2 c).

a) German Interests.

As has been mentioned at various instances, the German government intervened in *Anschütz* and lodged a formal diplomatic note on November 29, 1985. That attitude towards taking of evidence may be traced back to the German answer to a questionnaire distributed in 1968 to prepare the drafting of the Hague Evidence Convention: "Furthermore the hearing of a witness in a judicial proceeding constitutes an act of sovereignty which may only be performed by a judge or any other agent legally authorized."³⁴ The U.S. delegation that had taken part in the drafting of the Convention clearly understood the point made by the German government and other governments when it used the following formulation in its report: "In drafting the Convention, the doctrine of 'judicial sovereignty' had to be constantly borne in mind. Unlike the common-law practice which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities."³⁵ The term "judicial sovereignty" precisely designates what the German government is concerned about. Those concerns will, however, have to be explained in greater detail.

In *Messerschmitt*, the court of appeals remarked that "American discovery procedures may indeed inconven-

³⁴ Conference de la Haye de droit international prive, Actes et documents de la onzieme session, 7 au 26 octobre 1968, tome IV, Obtention des preuves a l'etranger, at 22 (1970)—author's translation from the French original.

³⁵ U.S. Delegation to the 11th session of the Hague Conference on Private International Law, Report of April 1969, 8 International Legal Materials 785, at 806 (1969).

ience the German civilian judicial system."³⁶ To many Germans who are involved as parties or witnesses in U.S. discovery proceedings, the situation is not just inconvenient, but frightening. The frightening aspect is not that they have to reveal the truth for the purposes of a specific claim brought before the court. They would have to do so under Convention procedures as well. The frightening aspect rather is that many matters would have to be revealed without ever being of any use for the ongoing litigation. German firms would not understand if their business operations in Germany, not just those in the U.S., were hampered for a considerable period of time by having to answer lengthy interrogatories, to disclose hundreds of files of documents and to give leave of absence to employees for depositions in the United States. As regards the production of documents, German defendants could not, unlike U.S. defendants, ease matters by allowing inspection to take place in Germany, since this would mean exercise of U.S. judicial authority within a foreign state, which is, if objected to by that state, clearly prohibited. In the case of a foreign witness, therefore, there is no way to control into whose hands the information disclosed might be passed on. Competitors might obtain valuable information. German witnesses are also concerned about the need to retain U.S. counsel for the purpose of preparing in Germany the taking of evidence in the United States and for the purpose of responding by requests for broad discovery against the plaintiff. German firms and individuals feel professional privileges to be undercut and business secrets to be jeopardized. The bargaining aspects of some of those campaigns for discovery and U.S. practice of paying contingency fees to lawyers cause additional resentment.

The German attitude should not be misinterpreted as in any way criticizing the U.S. judicial system as such.

³⁶ *Messerschmitt*, at 732.

It only results from unfortunate experiences caused by the interplay of the two systems whenever U.S. style discovery became effective in Germany. The German position has to be seen in the context of German procedures on taking evidence and of their constitutional background.

Court control of civil litigation in Germany has aptly been described as "conference method."³⁷ As regards the taking of evidence, three different phases could, perhaps, be distinguished although it would depend on the complexity of the case and to what extent these phases could overlap or coincide:³⁸

- (1) On the basis of two comprehensive pleadings, the one containing the complaint and the other one the defense, the judge will try to find out what the parties are aiming at and on what grounds, in his view, the claim and the defense could possibly be based. He will pay special

³⁷ Benjamin Kaplan/Arthur T. von Mehren/Rudolf Schaefer, *Phases of German Civil Procedure*, 71 HarvLRev 1193, 1443, at 1471 (1958).

³⁸ For a comprehensive English language description, the author's preference for the German system left aside, cf. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985); cf. also Rolf Bender/Christoph Strecker, *Access to Justice in the Federal Republic of Germany*, in: Mauro Cappelletti/Bryant Garth (eds.), *Access to Justice*, Volume I, Book II, at 551 et seq. (1978); Hartwig von Westerholt/Peter Lantz, *Litigation in Civil Courts*, in Bernd Rüster (ed.), *Business Transactions in Germany*, Volume I, Chapter 5, at 5-34 et seq (1983); Donald R. Shemansky, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 International Lawyer 465 (1983); Peter Gottwald, *Simplified Civil Procedure in West Germany*, 31 AmJCompL 687 (1983); Axel Heck, *Transnational Litigation: Federal Republic of Germany and the E.E.C.*, 18 International Lawyer 793 (1984); Hans Schima/Hans Hoyer, *Ordinary Proceedings in First Instance: Central European Countries*, in: *International Encyclopedia of Comparative Law*, Volume XVI, Chapter 6, p. 6-130 (1984).

attention to isolating the factual allegations necessary to support the various legal points and to finding out which of those facts have been admitted and which are still being contested by the other party and, therefore, have to be established through the taking of evidence. Even if a party is represented by counsel, the judge might find it necessary to suggest to supplement factual allegations and/or requests for taking evidence.

- (2) The judge will then hear the parties, perhaps urge a settlement and decide about the taking of evidence as to those of the factual allegations that are both relevant and contested. The taking of evidence may be ordered by a formal ruling, by an informal letter to both parties or by a more or less casual observation made during the hearing. To some extent, judges have the authority to order the taking of evidence not requested by either party in order to get a more accurate account of the relevant facts.
- (3) The actual taking of the evidence is carried out before court and under the direction of the judge. In particular, it will be the judge who extensively examines the witness and, only afterwards, allows for additional questions by counsel of each party. The judge then formulates a summarizing report of what the witness has said, always focusing on the relevant facts and those circumstances which throw light on the credibility of the witness. During the taking of evidence the judge makes sure that privileges of parties and third persons receive adequate protection even when no objections were raised to that effect.

Aiming at a rapid and correct conclusion of litigation is an objective Germany shares with the U.S. The

prominent role of the judge in controlling the taking of evidence, however, marks a notable contrast, not to other civil law countries, but to the U.S. Overcoming the laissez-faire liberalism of the 19th century, Germany gradually introduced welfare state notions into private litigation. The welfare aspect is that neither the parties nor third persons should suffer from poor presentation of their case often due to inadequate counseling which in turn may, but need not, result from a lack of financial resources. The judge, as both impartial and active director of the proceedings, has to redress any imbalances of advocatorial skills, and he has to take care that the final judgment be as close to objective truth as possible.³⁹

Today, that attitude is firmly established as a matter of constitutional law. The principle of welfare state is a binding principle of German constitutional law as is, of course, the equal protection clause.⁴⁰ Both provisions have repeatedly been applied in constitutional reviews of decisions of last instance in civil litigation. Thus the Federal Constitutional Court vacated a judgment of an ordinary court on the ground that the court should have exempted the party from a formally binding term.⁴¹ It also vacated a ruling on a compulsory auction, pointing out that the judge should have advised the applicant to

³⁹ Wolfram Henckel, *Vom Gerechtigkeitswert verfahrensrechtlicher Normen*, passim (1966); Karl August Bettermann, *Verfassungsrechtliche Grundlagen und Grundsätze des Prozesses*, 94 *Juristische Blätter*, 57, at 63 (1972); Rudolf Wassermann, *Der soziale Zivilprozess, Aufklärung im Zivilprozess*, at 38 et seq. (1982); for a short English-language reference to the concept see Peter Gottwald (note 38), Rolf Bender/Christoph Strecker (note 38) and especially Langbein (note 38), at 831 and 843.

⁴⁰ Basic Law of May 23, 1949, Articles 20 (1) and 3 (1); an English translation is published in: Amos J. Peaslee, *Constitutions of Nations*, 3d ed., vol. III, at 357 et seq. (1968).

⁴¹ Bundesverfassungsgericht, Ruling of April 29, 1980, 54 *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 117, at 124-25.

withdraw the application for commercial reasons,⁴² and in another case, that the judge himself should, in the absence of the party, have postponed the auction for the same reason.⁴³ In a case concerning social security procedures, the Federal Constitutional Court argued that the failure of the statute to provide for advocatorial assistance was compensated by the courts controlling by themselves the process of taking evidence.⁴⁴

There is another interrelated point of constitutional law explaining the German emphasis on "judicial sovereignty": the principle of proportionality. Proportionality is among the most frequently applied rules of constitutional law. It derives from the "Rechtsstaatsprinzip," the German equivalent to the due process clause, and it requires measures that interfere with private rights to be strictly limited to situations in which interference is both unavoidable and justifiable in view of reaching certain legitimate objectives.⁴⁵ The objective in this context is to hear and to decide upon a private claim submitted to private litigation. Under the principle of proportionality, therefore, the rights of personal privacy, commercial property, and business secrets may not be interfered with unless such interference is necessary to protect other persons' rights in the course of civil

⁴² Bundesverfassungsgericht, Ruling of March 24, 1976, 42 *BVerfGE* 64, at 78-79.

⁴³ Bundesverfassungsgericht, Ruling of April 24, 1979, 51 *BVerfGE* 150, at 156 et seq.

⁴⁴ Bundesverfassungsgericht, Ruling of January 22, 1959, 9 *BVerfGE* 125, et seq.; cf. also Bundesverfassungsgericht, Ruling of July 25, 1979, 52 *BVerfGE* 131, at 144 et seq. and Bundesverfassungsgericht, Judgment of July 1, 1980, 54 *BVerfGE* 237, at 273.

⁴⁵ For a recent discussion, with further references to doctrine and court practice, see Klaus Vogel/Wolfgang Martens, *Gefahrenabwehr*, 9th ed., at 389 et seq. (1986).

litigation.⁴⁶ As seen from this angle, court control of taking evidence is again required, else the taking of evidence could be too broad and would turn into discovery unrelated to the particular claim. It has to be emphasized, however, that the evidence that is really necessary for bringing a plausible claim may in most circumstances be freely taken, of course under court control. The comparison of privileges under German law and under U.S. law is not at issue.⁴⁷ The real issue is that in Germany the judge has to protect individuals against unnecessary attempts of disclosure and to grant whatever absolute privileges may be applicable.

To sum up, no objections against the substance of the product liability suits having been raised, at present it is only Germany's "judicial sovereignty" that is at stake. Yet Germany's judicial sovereignty is affected to a considerable extent. German defendants, and deponents and expert witnesses living in Germany, are being exposed to procedures of taking evidence which are in conflict not only with the German law and practice of civil procedure, but also with basic constitutional notions, such as the welfare function of the judiciary and the maintenance of proportionality in civil litigation. Both opinions under review, it is submitted, suffer from a failure to understand the dignity of those interests forming part of German judicial sovereignty.

b) United States Interests.

It naturally is within the interests of the U.S. to allow its courts to deal with any claims properly brought be-

⁴⁶ Karl Heinz Schwab/Peter Gottwald, *Verfassung und Zivilprozess*, at 67 (1984); proportionality being an undisputed guideline under German public law, there has not yet been any need for an extensive discussion of its application to civil procedure.

⁴⁷ As to this point, see Peter Schlosser, *Internationale Rechtshilfe und rechtsstaatlicher Schutz von Beweispersonen*, 94 *Zeitschrift für Zivilprozessrecht*, 369 passim (1981).

fore them in such a way as to be as close as possible to objective truth. In *Anschütz*, the court of appeals repeatedly stated that it saw no reason to confine discovery as against a defendant subject to its personal jurisdiction merely for the reason of the defendant's foreign nationality or of the foreign location of the evidence.⁴⁸ Similarly the court in *Messerschmitt* took note of the "American litigants' interest in promptly obtaining the documents and deposition testimony necessary to prepare for complex litigation in an American court."⁴⁹

From the U.S. point of view, administration of justice indeed does not protect either *Anschütz* or *Messerschmitt* against any taking of evidence just because of their foreign nationality or of the foreign location of the evidence. But whether such protection will be granted would have to be examined in view of the availability of alternative means to obtain the evidence necessary to establish the facts relevant for a disposition of the claims. As has been elaborated above,⁵⁰ Convention procedures give access to the necessary evidence located in Germany. To be sure, using the channels of the Hague Evidence Convention may seem more cumbersome to the American plaintiff. But that option cannot be ignored when it comes to an accommodation of interests as it will be explained in the following Subsection.

c) Accommodating German and United States Interests.

In the instant cases, a compromise could be reached by proceeding in two different phases: If, in a first phase, Convention procedures were used, German interests in judicial sovereignty would be fully respected while U.S. interests in obtaining the necessary evidence would either be met as well, if the litigation is concluded, or would,

⁴⁸ *Anschütz*, at 609, 611 et seq.

⁴⁹ *Messerschmitt*, at 732.

⁵⁰ *Supra* at 7a-15a of this opinion.

if no conclusion is reached, at most be suspended temporarily. U.S. courts could always, in a second phase, be asked to protect remaining U.S. interests by taking such measures as may then be necessary in order to have the evidence transferred from Germany into the U.S.

The court of appeals in *Anschütz* was quick in rejecting a second balancing under comity principles since it believed such balancing would always be in favor of the U.S. and would therefore constitute "the greatest insult to a civil law country's sovereignty."⁵¹ The court's conclusion is, it is submitted, not warranted, since it rests on the wrong assumption that using the channels of Convention would lead to nowhere. Experience tells, however, that upon using the Convention procedures the situation is likely to be quite different from what it is now.

The whole issue might, for various reasons, have become moot by then. The depositions could have produced sufficient information to go to trial. Or plaintiff could be prepared to drop the claim or to settle. If plaintiff felt the need of continuing discovery in order to prepare trial, the issues would nevertheless have been clarified to some extent. Requests for further information under the Convention could be formulated more precisely. Above all, production of reasonably identifiable documents could be prepared for the trial stage.

In view of the broad spectrum of possible developments, going through a first phase of using Convention procedures does make sense even to the U.S. U.S. plaintiffs will just have to overcome their natural antipathy against using procedures unfamiliar to them. Their interest in obtaining the necessary evidence being granted, allowance for different procedures must be made if evidence is located abroad. Equal treatment of domestic and

⁵¹ *Anschütz*, at 613.

foreign evidence means to provide an equal chance in adequately reaching the overall objectives of civil litigation. It does not suggest indiscriminate application of the same rules to situations as different as those.

Furthermore, such "enlightened" interpretation of domestic interests⁵² would also have to take into account the possibility of adverse reaction on the part of the foreign state in question. The U.S. might not mind U.S. defendants being exposed to a taking of evidence outside the channels of the Convention. Yet, there may be other reactions. The United Kingdom, for instance, has demonstrated that foreign defendants in U.S. lawsuits could, in the foreign state, be provided with a basis for reclaiming there whatever they were coerced to grant in the U.S.⁵³ Germany would certainly be most reluctant to engage in such retaliatory action. But it is not Germany alone that is involved in disputes regarding domestic taking of evidence from abroad. It may, therefore, be worthwhile to remember that the balance of power as it is presenting itself in the instant cases could well be changed in favor of the foreign party since, in view of the worldwide spread of commercial property, enforcement would raise no serious problems.⁵⁴

To sum up, in both *Anschütz* and *Messerschmitt*, German and U.S. interests are to be reconciled by going through the Convention channels first and, if at all necessary, by coming back to the question later whether and to what extent U.S. courts should, by themselves, order the taking of evidence from Germany.

⁵² Cf. Meessen, *Antitrust Jurisdiction* (note 26), at 798 et seq.

⁵³ For a recent survey cf. Gary B. Born, *Recent British Responses to the Extraterritorial Application of United States Law: The Midland Bank Decision and Retaliatory Legislation Involving Unitary Taxation*, 26 *VirgJInt'lL* 91 (1985/1986).

⁵⁴ For the related point of U.S. enforcement of U.S. orders see above at 5a.

V. Conflict Avoidance Under Comity Principles

Regarding state jurisdiction, international law only provides for a minimum standard which every state has to respect. Normally, states keep clear of any violation of that minimum standard by applying national rules of conflict laws which are tailored to the needs of each particular state. Comity has always been the primary instrument of U.S. law to avoid international conflicts likely to generate violations of international law. It would, therefore, be by applying comity principles that the U.S. could avoid violating the above rule of international law on the accommodation of interests of foreign states.

The U.S. principles of comity seem to be sufficiently open to permit U.S. courts to assess properly the weight of German judicial sovereignty and to reassess U.S. interests in view of the availability of Convention procedures in the instant cases. This writer, therefore, is confident that a realistic application of comity principles will make unnecessary any direct reference to international law. If, however, applying comity principles does not first suggest exhausting Convention procedures, such result would have to be reached by applying international law as the law of the land, lest the United States be exposed to international responsibility vis-a-vis the Federal Republic of Germany.

Chicago, Illinois, March 31, 1986

Karl M. Meessen

No. 85-1695

10

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SOCIETE NATIONALE INDUSTRIELLE
AEROSPATIALE and SOCIETE DE CONSTRUCTION
D'AVIONS DE TOURISME,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals for the
Eight Circuit**

**BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY
AS AMICUS CURIAE**

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QUESTIONS PRESENTED

1. Whether United States courts, having personal jurisdiction, may order the pre-trial production of documents located abroad in disregard of the Hague Evidence Convention.
2. Whether pursuant to the principles of international law United States courts should apply the Hague Evidence Convention when a discovery order results in a violation of foreign sovereignty or clearly established principles of a foreign nation.

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1986

—
No. 85-1695
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SOCIETE NATIONALE INDUSTRIELLE
 AEROSPATIALE and SOCIETE DE CONSTRUCTION
 D'AVIONS DE TOURISME,

Petitioners,

v.

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IOWA,

Respondent.

—
 On Writ of Certiorari to the
 United States Court of Appeals for the
 Eighth Circuit
 —

**BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY
 AS AMICUS CURIAE***

**INTEREST OF THE FEDERAL REPUBLIC OF
 GERMANY AS AMICUS CURIAE**

The issue before the Court is the applicability of the Hague Evidence Convention.¹ The Federal Republic

* Letters expressing the consent of the Parties are on file with the Clerk of the Court.

¹ Hague Convention on the Taking of Evidence Abroad in Civil

of Germany is a party to the Convention and is greatly concerned over United States courts' failure to apply it.

In *Anschuetz & Co. GmbH v. Mississippi River Bridge Authority et al.*, 85-98 (U.S. 1985), and *Messerschmitt Bolkow Blohm GmbH v. Walker*, 85-99 (U.S. 1985), which deal essentially with the same issue, it has as amicus curiae presented its views on the applicability of the Convention to the taking of discovery evidence abroad.² The Federal Republic of Germany sets forth the following additional considerations on the issue of the applicability of the Evidence Convention.

SUMMARY OF ARGUMENT

The Evidence Convention is applicable in this case. This treaty should be applied when a district court orders the taking of evidence in the territory of a nation which is a party to it. Ordering without using the Convention the production in the United States of evidence located within the territory of a signatory to the Convention violates that foreign country's sovereignty when its legal system places the power to

or Commercial Matters, *opened for signature*, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Germany on June 26, 1979).

² See 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98); 757 F.2d 729 (5th Cir. 1985), *petition for cert. granted*, 106 S.Ct. 1633 (1986), *cert. vacated*, 54 U.S.L.W. 3809 (U.S. June 10, 1986) (No. 85-99).

The prior briefs to the Court and the brief to the Fifth Circuit Court of Appeals *In Re Anschuetz & Co., GmbH* are attached hereto as Appendices A, B, and C.

take evidence solely and exclusively with its courts. Having personal jurisdiction over a party in and of itself does not authorize American courts to apply the Federal Rules of Civil Procedure in disregard of the Convention.

ARGUMENT

I. Judicial Assistance between U.S. and Foreign Courts prior to the Hague Convention

The signatories to the Evidence Convention entered into the treaty to end the high level of confusion and chaos in obtaining evidence abroad in transnational litigation prevailing prior to the Convention.³ Until 1972, when the United States ratified the Hague Service⁴ and Evidence Conventions, only U.S. domestic law provided procedures for gathering evidence abroad in proceedings before U.S. courts.⁵

Rule 28(b) of the Federal Rules of Civil Procedure, as amended in 1963, applicable to *outgoing* requests, provides for the taking of evidence abroad either in accordance with the law of the foreign country, or

³ For a description of the state of transnational litigation in the absence of organized cooperation see Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515 (1953); Heilpern, *Procuring Evidence Abroad*, 14 Tul.L.Rev. 29 (1939); Schein, *Inter-American Judicial Cooperation in Practice*, 18 D.C.B.J. 446 (1951).

⁴ Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature*, November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (entered into force between the Federal Republic of Germany and the United States on December 22, 1977).

⁵ See, e.g., Fed. R. Civ. P. 28(b) (stating the alternative procedures for taking deposition evidence located abroad).

by applying the law of the United States.⁶ However, already in their comments to the amendment to Rule 28(b), the drafters expressed their skepticism by acknowledging that some foreign countries were hostile to the idea of allowing discovery to be taken in their country.⁷

Incoming requests for judicial assistance from foreign courts have traditionally received liberal treatment in the United States in accordance with 28 U.S.C. §§ 1781 and 1782. The liberal discovery rules, however, have often been of little practical value in litigation before courts in civil law countries where discovery is unknown, and even more importantly, where judges, not counsel, take evidence as part of their judicial function.⁸

The lack of understanding between civil and common law countries with respect to their different legal systems led to inadequate and chaotic attempts at obtaining evidence abroad.⁹ United States judges, frustrated with their attempts to obtain evidence

⁶ While 28 U.S.C. §§ 1783 and 1784 also apply to discovery abroad, they are limited to U.S. nationals or residents.

⁷ See Advisory Committee note to 1963 amendment of Fed. R. Civ. P. 28(b).

⁸ For a scholarly analysis of German Law on Evidence, see Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 Colum. J. Transnat'l L. 231 (1986).

⁹ See, e.g., *United States v. Paraffin Wax*, 23 F.R.D. 289 (E.D.N.Y. 1959); *Danisch v. Guardian Life Insurance Co.*, 19 F.R.D. 235 (S.D.N.Y. 1956); *Uebersee Finanz-Korporation AG v. Brownell*, 121 F. Supp. 420 (D.D.C. 1954); *Branyan v. Koninklijke Luchtvaart Maatschappij*, 13 F.R.D. 425 (S.D.N.Y. 1953); *Ali Akber Kiachif v. Philco International Corp.*, 10 F.R.D. 277 (S.D.N.Y. 1950).

through judicial cooperation, continued to assert their long-arm jurisdiction to order discovery extraterritorially—backed by the threat of sanctions. These conflicts led to the negotiation and subsequent ratification of the Evidence Convention.

II. The Convention Is Not Limited to Non-party Witnesses

The court in *Aerospatiale* limits the application of the Convention to non-party witnesses. The language and legislative history of this treaty do not support this result. The drafters intended the treaty to apply to the examination of persons regardless of their specific relationship to the litigation.¹⁰ The United States and the Federal Republic of Germany both agree that the Convention applies to "persons" generally and that the distinction between "witnesses, parties and experts" was never contemplated.¹¹ Experience with the application of the Convention shows that the vast majority of discovery requests were directed to parties, mostly corporate defendants.¹² To limit the ap-

¹⁰ See *Explanatory Report of Philipp Amram (Conference of the Hague Convention on Private International Law) (Actes et documents de la onzieme session, TOME VI, 148 and 203 (1970).*

¹¹ See *United States Amicus Curiae Brief* at 6, in *Club Mediterranee v. Dorin*, appeal dismissed, cert. denied, 105 S. Ct. 286 (1984), where the Department of Justice reiterated this view first expressed by the U.S. treaty negotiators; Statement of the government of the Federal Republic of Germany on the Act to Implement the Hague Convention, Bundestagsdrucksache 8/218 at 9 (1977), see also Appendix A attached hereto, at 9a n.10.

¹² This is substantiated by the fact that all the cases the Court has been asked to decide in connection with the Convention involve discovery against corporations as defendant parties. *Aerospatiale*, 782 F.2d 120; *Anschuetz*, 754 F.2d 602; *Messerschmitt*, 757 F.2d 729; *Club Mediterranee*, 105 S.Ct. 286; *Falzon*, 104 S.Ct. 1260.

plication of the Convention to non-party witnesses renders this treaty useless for practical purposes. To argue that this limited application was the justification for the drafting and ratification of the Hague Evidence Convention, is not supported by the short history of the Convention.¹³

III. The Convention Has Proven to Be a Useful Treaty in German-American Bilateral Judicial Assistance

Germany is a party to the 1954 Hague Civil Procedure Convention,¹⁴ which is the predecessor to the Evidence Convention. In applying the 1954 Convention, the German Court of Appeals in Stuttgart held in 1968, that a request for judicial assistance should be complied with, even though the foreign procedure under which the request is to be executed is not known in Germany, as long as it does not conflict with German law.¹⁵

The German Court of Appeals in Munich in 1980, in the only decision by a German court on the Hague Evidence Convention, established that requests for judicial assistance should be liberally complied with.¹⁶

The Munich Court of Appeals stated:

¹³ See, e.g., United States *amicus curiae* brief at 7 n. 3, *Volkswagenwerk AG v. Falzon*, appeal dismissed, 104 S.Ct. 1260 (1984).

¹⁴ Twenty-eight States have adopted the 1954 Convention, to which the United States is not a party; see I Ristau, *International Judicial Assistance*, at 6 (1984).

¹⁵ Order of February 13, 1968, Oberlandesgericht (OLG) Stuttgart, in I VA 3/67.

¹⁶ *Corning Glassworks v. International Telephone and Telegraph Corp.*, (ITT), No. 76-0144 (W.D.VA. 1976); Judgment of Nov. 27, 1980, OLG Munich, 9 VA 4/80, translation of the judgment is attached as part of Appendix C at 43a.

The guiding principle mandating this result is the desire of the Federal Republic of Germany to place judicial assistance with the United States, which previously was carried out only on the basis of comity, on a solid treaty basis, as was done in the Convention on the Taking of Evidence here in question, and thereby also to take due account of the procedural device of "pre-trial discovery" which is unknown in German procedural law but not unfamiliar to Germany's treaty partner. . ."¹⁷

The German court specifically rejected challenges to the form and substance of the letter of request to take oral depositions. It held that the broad scope of the examination of the witnesses requested would not be in conflict with important and governing principles of German law, nor in violation of public policy.

The court permitted the pre-trial examination of witnesses as to the origin, content, business purpose and economic impact of documents. Counsel for one of the parties present at the taking of the oral depositions in this case expressed his satisfaction with the procedure applied by the German court in complying with the discovery request under the Convention.¹⁸ Traditional deposition discovery can therefore be effectively performed in the Federal Republic of Germany.

Pursuant to a bilateral agreement, first expressed in notes exchanged between the Federal Republic of

¹⁷ *Id.* at 52a of Appendix C.

¹⁸ Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States*, 16 Int'l Law 575, 584 (1982).

Germany and the United States in 1955/1956,¹⁹ the taking of voluntary oral testimony before U.S. consular officers and diplomats in Germany is permitted. Subsequent to the ratification of the Convention, this permission was reaffirmed on a number of occasions. Most recently, on May 31, 1983, the Federal Republic of Germany informed the U.S. Department of State and the U.S. Department of Justice, that parties to litigation and their attorneys may be present when voluntary testimony is given before consular officers, and that witnesses may also be accompanied by their own counsel.²⁰

Frequent use of this method of taking discovery evidence before United States consular and diplomatic officers has been made in the past in the Federal Republic of Germany, as reported to the German Ministry of Justice by the U.S. embassy in Bonn. This method has proven to be an effective procedure of taking discovery evidence in the Federal Republic of Germany in proceedings before U.S. courts.

In addition to the taking of voluntary evidence before U.S. consular and diplomatic officers, 181 formal letters of request from U.S. courts were received by German Central Authorities from 1980 through 1985. 154 of the letters of request were accepted and executed. The remaining 27 were rejected because the evidence to be taken was not sufficiently identified or the request was for the production of documents

¹⁹ U.S. *amicus* brief in *Falzon*, *supra* at 7 n.16.

²⁰ This bilateral agreement supersedes the Article 33 and 34 declarations to Article 16 of the Convention, made by the Federal Republic of Germany.

for pre-trial discovery.²¹ These figures disprove the argument that application of the Convention is futile.

In order to bridge the differences between various legal systems, the Convention permits signatories to express certain declarations, such as the Article 23 refusal to execute requests for the pre-trial production of documents, as known in common law countries.²² The Federal Republic of Germany has made such a declaration. The right to make this specific, clearly defined declaration was consented to by the United States. Article 23 has caused most of the problems in connection with the application of the Convention and has been used as justification by some circuit courts for rejecting the treaty in its entirety.²³

Upon ratification of the Evidence Convention, in 1979, the Federal Republic of Germany expressed its willingness to permit the production of certain documents.²⁴ The Federal Republic of Germany has recently accelerated the procedure for the issuance of regulations which will permit the pre-trial production of documents when they are clearly identified, relevant and do not unnecessarily divulge business se-

²¹ Source: Department of Justice of the Federal Republic of Germany.

²² Article 23: A contracting state may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

²³ See, e.g., *Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360 (D.Vt. 1984); *Graco Inc. v. Kremlin Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Lourance v. Weinig*, 107 F.R.D. 386 (W.D. Tenn. 1985); *Work v. Bier*, 106 F.R.D. 45 (D.D.C. 1985).

²⁴ Act to implement the Hague Evidence Convention, *Bundesgesetzblatt* December 22, 1977 I 3106, translated in Appendix A, at 12a.

crets. The government of the Federal Republic of Germany is endeavoring to issue the regulations before the end of 1986, after the necessary consent of the Bundesrat (Upper House of Parliament) has been obtained. This corresponds with suggestions made by the Government of the United States on the diplomatic level.

The decision of the Munich Court of Appeals, the liberal practice of granting the taking of evidence before consular and diplomatic officers of the US, and the anticipated issuance of regulations by the German government permitting the pre-trial production of documents, demonstrate the willingness of the Federal Republic of Germany to meet the needs of the American courts to the extent possible. For these reasons the Article 23 declaration should not detract from recognizing the overall usefulness of the Convention.

IV. The Convention Complements the Federal Rules of Civil Procedure

As a self-executing treaty the Convention enjoys the same status as a federal statute.²⁵ When there is a conflict between a federal statute and a later treaty, the treaty can work a repeal of the prior inconsistent statute.²⁶ The courts apply a two step test: a) to ascertain whether the treaty and the statute are truly in conflict, and if so, b) whether the intent of the treaty was to repeal the prior law.²⁷ Application of the first step of this test for the following reasons

²⁵ See, e.g., *Zenith Radio Corp. v. Matsushita Elect. Indus. Corp.*, 494 F.Supp. 1263 (E.D. Pa. 1980).

²⁶ *Frank Cook v. U.S.*, 288 U.S. 102 (1933).

²⁷ *Zenith*, *supra* at 1266

shows that the Convention does not conflict with the Federal Rules, but rather complements them.

The Federal Rules, with the exception of Rules 4(i)(1), 28(b) and 45 (e)(2), were not primarily designed for extraterritorial application.²⁸ Rule 34 governing production of documents, as contrasted with Rules 4(i)(1), 28 (b) and 45 (e)(2), is silent on whether it may be applied abroad. Unless congressional intent is expressed to the contrary, legislation must be considered to apply only within the territorial jurisdiction of the United States.²⁹ As there is no expression of congressional intent authorizing the extraterritorial application of the Rules governing discovery (with the noted exception of Rule 28(b)) it follows that these Rules do not apply to taking evidence abroad.

Since the treaty's specific purpose is to regulate the taking of evidence on the territory of another country, the Convention, as the *lex specialis*, governs extraterritorial discovery, rather than the Federal Rules of Civil Procedure.³⁰ The Convention replaces the need of U.S. courts to rely on comity when seeking evidence abroad under the Federal Rules with an assurance that judicial assistance, including the extraterritorial conduct of U.S. style pre-trial discovery, is a matter of treaty right.³¹

²⁸ Heck, *supra* at 263.

²⁹ *Foley Bros. Inc. v. Filardo*, 336 U.S. 281 (1949).

³⁰ See *Preiser v. Rodriguez*, 411 U.S. 475 (1973); See generally, Sutherland, Stat. Const. § 15.05 (4th Ed) 1985 Rev.

³¹ See n.17 OLG Munich at 52a.

Some U.S. courts³² have given weight to the statement of Philipp Amram, the delegate of the United States and rapporteur to the Convention, that this treaty would effect "no major changes in U.S. procedure nor require any major changes in United States legislation or rules".³³ The only reasonable interpretation of the rapporteur's statement is that the liberal execution of incoming requests from foreign courts as envisioned by Chapter I of the Convention is already authorized by 28 U.S.C. §1782 and that therefore no changes in U.S. rules are necessary.³⁴

Two special commissions on the operation of the Evidence Convention met in the Hague in 1978 and 1985 to consider the practical application of and actual compliance with the Convention. Specifically addressed were problems arising in connection with the exercise of the Article 23 declaration. It was indicated that future efforts will be made to explore different means to accommodate the requirements and desires embodied in the United States practice.³⁵ The Con-

³² See, e.g., Judge Briant's opinion in *Compagnie Francaise d'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. 16 (S.D.N.Y. 1984).

³³ Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 Am. J. Int'l L. 104, 105 (1973).

³⁴ See I Ristau at 256.

³⁵ For a partial transcript of the 1978 meeting see 17 ILM 1417 (1978); and for the 1985 Commissioner Report, see 1985 Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters, Permanent Bureau of the Conference. (hereinafter cited as 1985 Report).

vention expressly states that difficulties are to be resolved by diplomatic means.³⁶

V. Discovery Orders Should Not Violate Judicial Sovereignty of Foreign Nations

The Court of Appeals in *Aerospatiale* correctly acknowledged that the gathering of evidence by foreign attorneys in a civil law country for use in a proceeding abroad is "considered an unlawful usurpation of the public judicial function and an illegal intrusion on that nation's judicial sovereignty."³⁷ The Federal Republic of Germany also considers it a violation of its judicial sovereignty when a foreign court enforces the production in the United States of evidence which is located in Germany, since only a German court has the legal power to enforce compliance.³⁸ Even though issued in the United States, such order constitutes an extraterritorial assertion of sovereignty, because it requires acts to be performed in the Federal Republic of Germany where the evidence must be gathered.

In ratifying the Convention, the Federal Republic of Germany gave its consent as to the manner in which it will assist foreign courts in obtaining evidence in its territory. The United States has long recognized that any exceptions to the exercise of the sovereignty of a foreign nation must be consented to by the nation itself. "They can flow from no other legitimate

³⁶ Article 36: Any difficulties which may arise between contracting states in connection with the operation of this Convention shall be settled through diplomatic channels.

³⁷ *In Re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, at 123 (8th Cir. 1986).

³⁸ "The taking of testimony from witnesses and parties is a typical responsibility of the court", Order of February 13, 1968, OLG Stuttgart, see note 15.

source", as stated by Chief Justice Marshall in *Schooner Exchange*.³⁹ Obtaining evidence in the Federal Republic of Germany is the exclusive function of the German courts in the exercise of their judicial sovereignty.

The geographic fiction that the discovery takes place in the United States ignores the fact, that without the complying act in the foreign country, discovery in the United States would be non-existent. The distinction between preparatory acts abroad and the actual production of evidence in the United States is an artificial one. Signatory nations have repeatedly protested that such discovery orders violate their sovereignty.⁴⁰ These protestations have for the most part been disregarded by U.S. courts. The attempts to circumvent the Convention constitute a violation of the principle that treaties are to be interpreted in good faith.⁴¹

³⁹ *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 132 (1812).

⁴⁰ Letter from Embassy of the Federal Republic of Germany to the U.S. Department of State (Nov. 7, 1983), reprinted in Brief for U.S. as Amicus Curiae at 1a, *Volkswagenwerk v. Falzon*, No. 82-1888 (U.S. 1983); Letter from Ambassador of the Federal Republic of Germany to the Supreme Court of Michigan (June 25, 1982), see also *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 33 Cal. App. 3d 503, 505, 109 Cal. Rptr. 219, 220 (3d Dist. 1973); Letter of French Ministry of Justice to U.S. Department of Justice, reproduced in Brief for Appellants, *Club Mediterranee, S.A. v. Dorin*, appeal dismissed, cert. denied, 53 U.S.L.W. 3285 (U.S. Oct. 16, 1984); also, Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad; The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev. 733, 764-65 (1983).

⁴¹ See, e.g., *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902);

A number of signatories have enacted so-called blocking-statutes which prohibit the furnishing of documents or information as evidence in a foreign proceeding.⁴² The Federal Republic of Germany has not enacted a blocking-statute. However, when a discovery order of a foreign court violates German law, a German court may issue an injunction prohibiting the production of documents or other evidence being sought.⁴³ Such an injunction may ultimately lead to confrontation with courts of foreign countries as exemplified in cases involving a blocking-statute. This

See also Bishop, *Significant Issues in the Construction of The Hague Evidence Convention*, 1 Int'l Litigation Q. 2, 38 (1985).

Treaties must also be performed in good faith. See Restatement (Second) of the Foreign Relations Law of the United States § 138 (1965).

⁴² E.g. the U.K., Protection of Trading Interests Act, 1980; France, Statute No. 80-538 (July 17, 1980) reprinted in *Journal Officiel de la Republique Francaise*; the Netherlands, Statute enacted on June 28, 1956, reprinted in 1956 *Staatsblad* 401 and (1958) 413; Sweden, Royal Proclamation of May 13, 1966.

⁴³ On June 30, 1982, the Regional Court OLG Kiel, *Recht der Internationalen Wirtschaft (RIW/AWD)* 206, (1983), issued an injunction ordering a German bank which maintained a subsidiary in New York, under the threat of a penalty of up to DM 500,000 or 6 months imprisonment, not to comply with a U.S. District Court Order to produce documents pursuant to a subpoena. The court held that courts of the United States have no authority to enforce orders which only German courts are authorized to issue. Even though this case deals with sanctions in an antitrust proceeding, German authors on the subject of the Convention acknowledge that injunctive relief is available to prevent discovery in civil matters, *Stuerner*, 81 ZVglRW at 206 et seq., (1982); *Schuetze*, 21 Zeitschrift fuer Wirtschaft-und Bankrecht, at 636 (1986).

is precisely what the Evidence Convention is designed to prevent.

It would be highly undesirable if the application of the Hague Evidence Convention were to depend on the fact that a country has issued a blocking statute. This would tend to encourage enactment of further blocking statutes and other protective measures so as to prevent the extraterritorial application of U.S. law in violation of the Convention.

The last time the Court addressed the issue of a conflict between the Federal Rules of Civil Procedure and foreign law in the context of an order for the production of documents, was in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). There the Court upheld the power of a district court to require the production of documents located in Switzerland, but denied the sanction of dismissal of the action for the failure to comply with the discovery order.

In *Societe* the Court was not faced, as it is now, with a binding treaty on the taking of evidence abroad, whereby the United States has agreed to respect declarations by the treaty's signatories on the pre-trial production of documents. In the opinion of the amicus, the existence of this treaty requires that the holding in *Societe* be modified so that district courts must apply the methods provided for in the Convention. To hold that the district courts should in each case merely *consider* the applicability of the Convention in the balancing of competing interests effectively denies the Convention its status as a treaty. Such a holding purports to give deference to foreign sovereignty, when it in fact abrogates the treaty which already incorporates the balancing of competing sovereign interests.

The court in *Aerospatiale* cites *Anschuetz*, stating that "the greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure."⁴⁴ Should U.S. courts strengthen their efforts to comply with an existing treaty ratified by the United States and the Federal Republic of Germany, this would in the opinion of the Federal Republic of Germany, not increase the likelihood of a violation of its sovereignty but would in fact meet its expectations. The Federal Republic of Germany requests that the Supreme Court give the Evidence Convention the force and effect of a solemn treaty obligation as mandated by Article VI, § 2 of the United States Constitution.

CONCLUSION

For the reasons stated above, the Federal Republic of Germany supports the petitioner. Accordingly, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

August 22, 1986

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⁴⁴ See *Aerospatiale*, 782 F.2d 120, at 125-126.

APPENDIX A

1a

No. 85-98

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ANSCHUETZ & Co., GmbH,

Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,

Respondents.

**PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

**BRIEF FOR THE FEDERAL REPUBLIC
OF GERMANY
AS AMICUS CURIAE**

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QUESTION PRESENTED

Whether a district court may order the production in the United States of documents located in the Federal Republic of Germany and the taking of oral depositions in the United States of employees of a party residing in Germany in disregard of the multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF APPEALS FOR THE
 FIFTH CIRCUIT**

**BRIEF FOR THE FEDERAL REPUBLIC OF
 GERMANY AS AMICUS CURIAE**

This brief for the Federal Republic of Germany is filed with the consent of the parties.¹ With U.S. Department of State circular note, dated August 17, 1978, to the Chiefs of Missions in Washington, D.C., the Federal Republic of Germany was informed that the procedure of transmitting diplomatic notes to the Supreme Court is not authorized by the

¹Letters expressing such consent are on file with the Clerk of the Court.

rules of the Court, and that the Court prefers foreign governments to present their views by filing amicus curiae briefs.² The views of the Federal Republic of Germany are accordingly expressed herewith.

I. INTEREST OF THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE

The Federal Republic of Germany's interest in this case derives from it being a state party to the multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (hereinafter cited as Evidence Convention), entered into force between the United States and the Federal Republic of Germany on June 26, 1979. The issue before the Court is the proper interpretation and application of this Treaty to which seventeen nations are parties.³ The court of appeals' holding in *In re Anschuetz*, 754 F.2d 602 (5th Cir. 1985), permitting a district court to order, under the threat of sanctions, (a) the production in the United States of documents located in the Federal Republic of Germany and (b) the taking of testimony in the United States of petitioner's employees residing in the Federal Republic of Germany, violates the Convention and infringes upon German sovereignty. The substantial interest of the Federal Republic of Germany is further evidenced by its amicus curiae brief to the court of appeals on the issue of the applicability and scope of the Evidence Convention. The Federal Republic of Germany adheres to the position expressed in that brief, but sets forth below in support of the petition for writ of certiorari additional considerations.

²See 1978 Digest of U.S. Practice in Int'l Law at 560.

³For a list of signatories see 1984 Treaties in Force at 251.

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner, a corporation organized under the laws of and domiciled in the Federal Republic of Germany, is a third party defendant to a complaint for damages resulting from the alleged failure of a steering device furnished by petitioner in a vessel involved in a ship collision in the port of New Orleans.

The district court ordered the taking of depositions of petitioner's employees in Germany and the production in the United States of documents located in Germany. *Anschuetz*, 754 F.2d at 604. The court of appeals denied petitioner's application for a writ of *mandamus*. In denying the writ of *mandamus* the court of appeals held that a district court may order a party to produce in the United States documents located in the Federal Republic of Germany and to make available its employees residing in Germany for depositions in the United States.

III. SUMMARY OF ARGUMENT

To hold the Convention applicable only to the taking of evidence from persons over whom the court does not have jurisdiction⁴ renders the Convention meaningless and is inconsistent with its language and with the intent and expectations of its signatories. Moreover, the court of appeals' decision, allowing courts to order, under the threat of sanctions, the removal of documents located in Germany to the United States and the testimony of German residents in the United States, violates the Federal Republic of Germany's sovereignty. The Federal Republic of Germany considers

⁴The court of appeals recognized the applicability of the Convention to the taking of involuntary depositions of a party in the Federal Republic of Germany and to the production of documents gathered from persons in Germany who are not subject to the court's *in personam* jurisdiction. *Anschuetz*, 754 F.2d at 615.

the Evidence Convention a workable treaty. It believes the issues of its application and its scope deserve consideration by the Court. Therefore the Federal Republic of Germany supports the granting of certiorari.

IV. ARGUMENT

1. The Holding in *Anschuetz* is Inconsistent with the Language and the Legislative History of the Evidence Convention

The court of appeals limited the Convention to the taking of evidence abroad from persons over whom a district court does not have *in personam* jurisdiction and to involuntary depositions of a party conducted in a foreign country. Such limitations to non-party witnesses are inconsistent with the language, spirit, and legislative history of the Evidence Convention, and, if upheld, would substantially narrow its intended use.

The court of appeals, in analyzing the Convention's applicability, drew distinctions between (a) "parties" and "witnesses" and (b) "parties subject to the court's jurisdiction" and "persons not under the court's jurisdiction". These distinctions are not expressed in the text of the Convention and the drafters never intended them to exist.⁵ The drafters intended the treaty to apply to the examination of persons regardless of their specific relationship to the litigation.⁶ They therefore considered it unnecessary to distinguish between "witnesses, parties and experts", since these

⁵*Explanatory Report of Philip Amram (Conference of the Hague Convention on Private International Law)*, Actes et documents de la onzieme session, TOME VI, 203 (1970) (hereinafter cited as Actes et documents).

⁶*Id.*

terms fall under the comprehensive and broad category of "persons".⁷

The United States delegation negotiating the treaty also expressed that "party" and "witness" were encompassed in the broad term "person".⁸ It referred to Article 3 (e), (f) and (g) of the Convention which provides that a Letter of Request may be used to examine "persons".⁹

The German interpretation of the Evidence Convention coincides with the United States' interpretation. The legislative history of the treaty in the Federal Republic of Germany reveals that when the government presented the treaty to the Bundestag (parliament) for ratification, it intended that the requests for the taking of evidence abroad were to be directed at "persons", and that no distinction between parties and witnesses was to be made.¹⁰

The report on the Act to Implement the Evidence Convention by the Bundesrat (Upper House) either refers to "persons" or to both "parties and witnesses".¹¹ It never used or intended to use the term "party" or "witness" exclusively.

Accordingly, the positions taken by the United States and the Federal Republic of Germany are in agreement that the

⁷*Id.*

⁸*Id.* at 30.

⁹See also United States *amicus curiae* brief at 6 in *Club Mediterranee v. Dorin*, appeal dismissed, cert. denied, 53 U.S.L.W. 3285 (U.S. Oct. 16, 1984) where the Department of Justice reiterated this view first expressed by the U.S. treaty negotiators.

¹⁰Statement of the Government of the Federal Republic of Germany on the Act to Implement the Hague Convention, Bundestagsdrucksache 8/218 at 9 (1977).

¹¹Report of the German Bundesrat on the Act to Implement the Hague Convention, Bundestagsdrucksache 8/217 at 54 (1977).

Convention applies to persons generally. Neither country intended to limit the treaty's application solely to persons not under the court's jurisdiction as expressed by the *Anschuetz* court.

2. In Personam Jurisdiction is not Absolute in International Litigation

The vast majority of requests for the production of documents located in Germany is directed to parties subject to an American court's *in personam* jurisdiction. Limiting the Convention, as the court of appeals did, to cases in which persons are not subject to the court's *in personam* jurisdiction, would result in such infrequent use of the treaty as to render it meaningless. When the drafters convened to negotiate the treaty they could hardly have contemplated drafting a document with virtually no practical applicability.

As the Federal Republic of Germany stated in its brief to the court of appeals, it considers the taking of oral depositions in Germany and the production in the United States of documents located in Germany a violation of its sovereignty unless the order is transmitted and executed by Letter of Request under the Evidence Convention, regardless of whether the United States court has *in personam* jurisdiction over the German party.¹²

The Federal Republic of Germany likewise considers it a violation of its sovereignty when a foreign court forces, under the threat of sanctions, a person under the jurisdiction of German courts to remove documents located in Germany to the United States for the purpose of pre-trial

¹²The United States in its amicus brief at 7 in *In re Anschuetz*, 754 F.2d. 602 (1985) recognized that the concern expressed by the Federal Republic of Germany over its sovereignty "... requires the district court to reconsider that order and to apply a careful comity analysis".

discovery, or orders a person, under the threat of sanctions, to leave the Federal Republic of Germany and travel to the United States to be available for oral depositions. The taking of evidence is a judicial function exclusively reserved to the courts of the Federal Republic of Germany.¹³ Only its courts are empowered to compel persons under their jurisdiction to comply with orders of a foreign court requiring the gathering of evidence in the Federal Republic of Germany and its removal to the United States.¹⁴ Sovereign states must be committed to protecting their sovereignty within their territory.¹⁵ If a U.S. court's exercise of *in personam* jurisdiction would violate Germany's sovereignty, the court should be required, in accordance with the principles of international comity, to first apply the methods for taking evidence abroad to which the United States and the Federal Republic of Germany have agreed under the Convention.

3. The Court of Appeals Misconstrued the Reservation under Article 23 of the Convention.

The court of appeals erroneously concluded that the reservation under Article 23 of the Convention would give foreign authorities complete power to determine how much discovery may be taken from their nationals who are litigants before American courts. *Anschuetz*, 754 F.2d at 612. Article 23 authorizes a signatory to declare that it will not execute Letters of Request issued for the purpose of obtaining pre--

¹³See, e.g., United States amicus curiae brief at 5 in *Volkswagenwerk A.G. v. Falzon*, appeal dismissed, 104 S. Ct. 1260 (1984).

¹⁴See, e.g., Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad. The Impact of the Hague Evidence Convention*, 37 U. Miami L. Rev., 733, 761 (1983) (detailed discussion of "judicial sovereignty").

¹⁵See Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 Int'l Law. 487, 495 (1985).

trial discovery of documents as known in Common Law Countries.

The Article 23 reservation affects only one method of United States discovery. As the Federal Republic of Germany stated in its brief to the court of appeals (at 12) pre-trial discovery by way of oral depositions can be successfully effected in Germany under the Convention.¹⁶ It has furthermore stated (at 14), that Germany permits the production of documents to be used at trial, allows the examination of witnesses relating to documents and intends to consider the practical experience gained thus far and to be gained in the future in connection with the promulgation of regulations for pre-trial production of documents.

The intent to accomodate foreign procedures is further evidenced by Section 14 of the Act to Implement the Hague Evidence Convention in the Federal Republic of Germany which provides:

(1) Letters of Request which concern a procedure in accordance with Article 23 of the Convention will not be granted.

(2) However, to the extent that the fundamental principles of the German Law of Procedure are not violated, such requests may be granted considering the justified interests of the persons involved, after the requirements for the granting of such requests and the applicable procedure have been implemented by Regulations which the Minister of Justice with the consent of the

¹⁶See Platto, *Taking of Evidence Abroad for Use in Civil Cases in the United States*, 16 Int'l Law. 575 (1982), where the author, an attorney of record in a transnational litigation, expressed his satisfaction with the execution of a request to take oral depositions by a German court in Munich.

Bundesrat (Upper House of Parliament) may issue. Bundesgesetzblatt 1977 I 3106.¹⁷

The reservation under Article 23 was thoroughly deliberated by the negotiators of the Convention and was agreed upon to satisfy the different legal systems to which the Convention would apply.¹⁸

The head of the United States delegation and official rapporteur of the Convention made it clear that the civil law countries could not be persuaded to change their procedures overnight to accomodate the liberal U.S. evidence taking procedures.¹⁹ This clearly expresses the motivating force behind the drafting of the Convention to establish a uniform set of minimum procedures acceptable to all signatories to take due account of the substantial differences between the various legal systems involved. The holding of the court of appeals makes the reservation under Article 23 meaningless and establishes a result through judicial action which the signatory states could not and did not agree to at the drafting table. This issue deserves consideration by the Court.

4. The Convention Is Workable and Should Be Applied According to Its Terms

The Federal Republic of Germany recognizes that obtaining evidence abroad is not without difficulties and that the

¹⁷The translation is provided by counsel for the amicus who is a member of the German bar.

¹⁸See, e.g., *Explanatory Report on the Convention on Taking of Evidence Abroad in Civil or Commercial Matters*, 12 I.L.M. 327, 329 (1973); *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law*, 8 I.L.M. 785 at 809-9 (1969).

¹⁹Amram, *The Proposed Convention on the Taking of Evidence*, 55 A.B.A. J. 651, 655 (1969).

Convention has not in all respects fulfilled the desire, expressed by the signatories in the preamble, to improve mutual judicial cooperation in civil or commercial matters.

The Convention, however, has not been ineffective between the United States and the Federal Republic of Germany. From December 31, 1979, when the Evidence Convention came into force between the two nations, through 1984, 151 requests under the Convention were addressed to German courts. 131 of these requests were accepted and executed. Most of the remaining 20 requests were rejected because the evidence to be taken was not sufficiently identified or the request was for the production of documents under pre-trial discovery.²⁰

With regard to future requests for production of documents, the Department of Justice of the Federal Republic of Germany is considering, at the present time, regulations to permit the granting of certain of these requests. The holding in *Anschuetz* hinders this development, because it permits the exercise of discretion by American courts to take evidence abroad either by applying the methods of the Convention or by ordering the evidence to be produced in the United States. As a result the contemplated regulations involving the production of documents would be futile.

In a subsequent decision in *In re Messerschmitt Boelkow Blohm*, 757 F.2d 729 (5th Cir. 1985) the court of appeals reaffirmed its holding in *Anschuetz* permitting the district court to order the production of documents located in Germany in the United States. For the reasons stated above,

²⁰The Department of Justice of the Federal Republic of Germany requested the central authorities who are under the jurisdiction of the German Laender (States) to furnish these figures in order to advise the Court on the past experience with the Convention in the Federal Republic of Germany.

the *Messerschmitt* holding also violates the Evidence Convention and infringes on German sovereignty. The Federal Republic of Germany therefore also supports the petition for writ of certiorari filed in said case.

CONCLUSION

For the reasons stated above the Federal Republic of Germany requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

Date: August 1, 1985

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APPENDIX B

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANSCHUETZ & Co., GmbH,
Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

MESSERSCHMITT BOLKOW BLOHM, GmbH,
Petitioner,

v.

WALKER, *et al.*
Respondents.

On Petitions for Writs of Certiorari to
United States Court of Appeals
for the Fifth Circuit

**SUPPLEMENTAL BRIEF
OF THE AMICUS CURIAE
FEDERAL REPUBLIC OF GERMANY**

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1985

No. 85-98

ANSCHUETZ & Co., GmbH,
Petitioner,

v.

MISSISSIPPI RIVER BRIDGE AUTHORITY, *et al.*,
Respondents.

No. 85-99

MESSERSCHMITT BOLKOW BLOHM, GmbH,
Petitioner,

v.

WALKER, *et al.*,
Respondents.

On Petitions For Writs of Certiorari to
 United States Court of Appeals
 for the Fifth Circuit

**SUPPLEMENTAL BRIEF
 OF THE AMICUS CURIAE
 FEDERAL REPUBLIC OF GERMANY**

Pursuant to Rule 22.6 of the Rules of this Court, which the amicus curiae deems to be the most nearly applicable, the Federal Republic of Germany herewith respectfully files this brief for the purpose of calling to the Court's attention

the diplomatic note presented by the Federal Republic of Germany to the United States Department of State on April 8, 1986, which is attached hereto. This note underscores the strong interest of the Federal Republic of Germany in obtaining review by this Court of the important issues raised in these cases.

In *Anschuetz* the Court of Appeals for the Fifth Circuit held that "the Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules."

The Solicitor General admits that this holding, which he refers to as a mere "statement", is "plainly overbroad" (Brief of Solicitor General, at 17 n.21), that the comity analysis of the *Anschuetz* court is "cursory" (Br. at 13) and that the decision contains "some troublesome language" (Br. at 6), yet he supports the decision for its supposed correct result. However, it is these flawed aspects of *Anschuetz* which other courts have subsequently relied on when ruling on the applicability of the Convention.¹

¹ See, e.g., *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 124-25 (8th Cir. 1986) (relying on *Anschuetz* and holding that when a district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may be physically located within the territory of a foreign signatory to the Convention); *Lowrence v. Weinig*, 107 F.R.D. 386, 389 (W.D. Tenn. 1985) (holding that no comity analysis is necessary when production of documents located abroad is to occur in this country); see also *In re Ljusne Katting*, A.B., No. 85-2573 (5th Cir. 1985) (citing with approval *Anschuetz* "overbroad" statement, but holding that the Convention must be used when deposing foreign nationals in their home country or inspecting premises in a foreign country).

The Federal Republic of Germany is concerned that the trend toward improved judicial assistance between the United States and the Federal Republic of Germany, reflected by the ratification of the Hague Evidence Convention, may have been halted or even reversed by this decision. The Court should therefore grant certiorari to narrow *Anschuetz* and to enunciate the elements of a proper comity analysis to be used in connection with the Convention.

Respectfully submitted,

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APPENDIX A

Embassy of the
 Federal Republic of Germany
 Washington, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to make the following comments on the amicus curiae brief for the United States in the matters of *Anschuetz & Co. GmbH*, petitioner, v. *Mississippi River Bridge Authority*, et al, and *Messerschmitt-Boelkow-Blohm, GmbH*, petitioner, v. *Virginia Walker*, et al.

The Embassy has taken note, with surprise, of the US Government's recommendation to the Supreme Court not to grant certiorari in a matter on which the Federal Republic of Germany has, throughout the years, continuously expressed its grave concern.

In its brief, the US Government seriously underestimates the German Federal Government's resolve concerning German judicial sovereignty which is embedded in the German constitution, and, therefore, cannot be waived by the government. Whether evidence is to be taken on German territory or taken from German territory to another country, the German parties or witnesses concerned have a constitutional right that a German judge supervise the process of taking evidence lest certain fundamental rules of the German law be violated.

The respect of another country's judicial sovereignty is the very principle of international law upon which all international treaties on judicial assistance are based and which the Federal Republic of Germany hoped to see observed by the United States when becoming a party to the Hague Evidence Convention.

Furthermore, the US Government's brief fails to take account of the fact that evidence taken in the Federal Republic of Germany under the procedure of the Hague Evidence Convention can be utilized in American courts.

Verbatim transcripts of witnesses' testimony can be taken and American parties may be present and ask questions at court hearings. Although the taking of documentary evidence is not yet possible in the Federal Republic of Germany during the pre-trial stage, witnesses may be questioned by German courts on the contents of documents located in the Federal Republic of Germany to the extent such documents are relevant to the litigation. The practice of substituting the testimony of witnesses for pre-trial production of documents has in the past been used by US parties seeking evidence in the Federal Republic of Germany.

Thus, through exhausting convention procedure, infringement upon German sovereignty can be avoided without impairing the US interest in granting US plaintiffs such access to evidence as they may need to obtain proof for their claims against German defendants.

The Federal Republic of Germany continues to support petitioners' request in *Anschuetz* that the US Supreme Court grant certiorari and render a decision taking into account the respect of other countries' sovereignty which is the fundamental principle on which international law is based.

Washington, D.C., April 8, 1986

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-3286

IN RE ANSCHUETZ & Co., GmbH, *Petitioner*
COMPANIA GIJONESA DE NAVEGACION *Respondent*

Petition for a Writ of Mandamus Directed to the
United States
District Court for the Eastern District of Louisiana,
the Honorable George Arceneaux, Jr., Presiding

BRIEF OF THE FEDERAL REPUBLIC OF GERMANY
AS AMICUS CURIAE

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FEDERAL REPUBLIC OF GERMANY

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QUESTION PRESENTED:

Whether orders of the U.S. District Court for the Eastern District of Louisiana directing the taking of depositions of German nationals in the Federal Republic of Germany and the production of documents located in the Federal Republic of Germany are contrary to the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 28 U.S.C.A. § 1781 (1983 Suppl.).

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 84-3286

IN RE ANSCHUETZ & Co., GmbH,
Petitioner

**On Petition for Writ of Mandamus To The United
States
District Court for the Eastern District of Louisiana**

**BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY
AS AMICUS CURIAE**

INTRODUCTION

This brief is submitted in response to the Court's order that it welcomes any diplomatic representations which the Department of Justice for the Federal Republic of Germany will make through the Department of State, either directly or through the Department of Justice. The Federal Republic of Germany in response to its request to transmit its representations to the Court was advised by the Department of State that it should present its views through the filing of a brief as amicus curiae in accordance with the U.S. State Department circular note of August 17, 1980, *see* Digest of U.S. Practice in Int'l Law, 560 (1978), attached hereto as Appendix A.

STATEMENT OF THE CASE

Anschuetz & Co., GmbH, (hereinafter referred to as Anschuetz) is a corporation organized under the laws of the

Federal Republic of Germany, domiciled in Kiel, Germany. It is a third party defendant in *Mississippi Bridge Authority v. M/V Pola De Lena, et al.*, C.A. No. 79-470 in the United States District Court for the Eastern District of Louisiana. The third party amended complaint against Anschuetz alleges product liability based on the failure of a steering device furnished by Anschuetz in a vessel involved in a ship collision in New Orleans.

The District Court ordered the taking of depositions of employees of Anschuetz in Kiel, Germany and ordered Anschuetz to produce in New Orleans documents located in Kiel, Germany. Anschuetz opposed these discovery orders on the ground that they violate the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 28 U.S.C.A. § 1781 (1983 Suppl.), (hereinafter referred to as Evidence Convention).

In its ruling of April 13, 1984, on the motion of Anschuetz for review of the discovery orders, the District Court held that the rules of the Evidence Convention do not affect the Court's ability to enforce discovery procedures as authorized by the Federal Rules of Civil Procedure.

The Court stated:

...to say that the combination of Rule 5, which permits service of motions and discovery motions and so forth on counsel of record, Rule 34, which requires a party to produce records which are in his possession, custody or control subject, of course, to protective order of the Court, or Rule 30 (b) (6) which requires that a private corporation who is a party designate one or more officers, directors or managing agents to testify, and to permit them to testify pursuant to the discovery provisions, are all subject to the Hague Convention, to this Court makes no sense at all.

The Court has personal jurisdiction over Anschuetz. The Court intends to enforce the provisions of the Federal Rules of Civil Procedure as to this party over which it has jurisdiction to the same extent that it would enforce those rules against any party over which it has jurisdiction. The motion, accordingly, will therefore be denied on that ground. (Transcript of hearing of April 13, 1984, p. 8).

On April 19, 1984, Anschuetz filed a petition for writ of mandamus in the United States Court of Appeals for the Fifth Circuit ordering and directing the District Court to recall its order to produce in New Orleans documents located in Germany and to take depositions in Germany under the United States Federal Rules of Civil Procedure.

ARGUMENT

The Orders of the District Court conflict with the Evidence Convention and violate a treaty the United States have entered into with the Federal Republic of Germany and are therefore invalid.¹ The Federal Republic of Germany intends to show in this brief that in spite of certain restrictions agreed to by the signatories to the Convention the German central authorities and courts have exercised sound discretion, and have shown good faith cooperation in executing requests for the taking of evidence in the Federal Republic of Germany. The Convention is a practicable tool of international judicial assistance between nations with different legal systems and should not be rejected on the grounds advanced by the District Court.

¹ See *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353, 356 (5th Cir. 1981).

I. Methods of taking evidence in the Federal Republic of Germany for use in a civil proceeding before a United States Court

The Convention provides for three methods of taking evidence abroad in civil or commercial litigation pending before U.S. courts:

- a) A Letter of Request transmitted through a Central Authority (in the instant case the Minister of Justice of the Land Schleswig Holstein, D 2300 Kiel) to a foreign court, which conducts the proceeding (Arts. 1-14);
- b) Notice to appear before an American diplomat or consular officer (Arts. 15-16); and
- c) Designation of a private commissioner to take evidence (Art. 17).

The Federal Republic of Germany expressed its reservation under Articles 33 and 35 of the Convention not to allow the taking of evidence before a consular officer, a diplomat, or a commissioner. In spite of this reservation the Federal Republic of Germany permits the taking of oral testimony by U.S. consular officers and diplomats on German soil, provided it is conducted on a voluntary basis. This permission was first expressed in notes exchanged between the Federal Republic of Germany and the United States in 1955-1956.² Subsequent to the ratification of the Convention this permission was reaffirmed on a number of occasions, the last time on May 31, 1983, when the Federal Republic of Germany further informed the U.S. State Department and the U.S. Department of Justice that parties to litigation and their attorneys may be present when voluntary testimony is given before consular officers,

² See *Volkswagen v. Falzon*, 100 S.Ct. 1819 (1983) Brief of United States as amicus curiae, at 7.

and that witnesses may also be accompanied by their own counsel.

II. The Evidence Convention preempts conflicting provisions of the Federal Rules of Civil Procedure.

a) The Evidence Convention is not supplementary to the Federal Rules of Civil Procedure, to the contrary, it provides the only method for taking compulsory evidence in the Federal Republic of Germany. In its preamble the signatory States expressed their desire to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they utilize for this purpose and their desire to improve mutual judicial co-operation. The preamble of the Convention is a confirmation of the intention of the contracting States to insure that the taking of evidence abroad be effected in accordance with the rules and provisions agreed upon by the signatory States to the Convention. It follows, therefore, that it would be contrary to the spirit of the Convention, as well as to the principles of international legal co-operation, if United States Courts would circumvent the Convention by ordering German nationals or corporations, having their permanent residence or place of business in the Federal Republic of Germany, to submit in the United States to the taking of evidence located abroad.

The Evidence Convention was fashioned after the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, hereinafter referred to as Service Convention.³ The Courts in the United States have consistently held that the Service Convention to which the Federal Republic of Germany is also a party is exclusively applicable on the service of

³ 20 U.S.T. 361, T.I.A.S. No. 6638. See Letters of Transmittal of the President of the United States to the U.S. Senate on the Evidence Convention of February 1, 1972; *Volkswagen v. Falzon*, 100 S.Ct. 1819, Brief of U.S. as amicus curiae, at 4.

process in foreign countries.⁴ Even though the Evidence Convention supplements the Service Convention, and should therefore be similarly construed, courts in the United States have not done so.⁵

The argument that the methods of the Convention for taking evidence abroad are not exclusive is based on the erroneous conclusion that Art. 27 of the Convention would permit the requesting Court to order other methods of discovery than by Letters of Request.⁶ Art. 27 provides:

The provisions of the present Convention shall not prevent a contracting state from—

- a) declaring that Letters of Request may be transmitted to its judicial authorities

⁴ See *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280, 287-289 (3d Cir. 1981); *Porsche, AG v. Superior Court*, 123 Cal. App.3d 755, 760-762, 177 Cal. Rptr. 155, 157-159 (1981); *Low v. Bayrische Motorenwerke*, 88 A.D.2d 504, 505, 449 N.Y.S.2d 733, 735 (1982).

⁵ In *General Electric v. North Star Int'l, Inc.*, No. 83-C-0838 (N.D. Ill. 2/21/84) (attached hereto as Appendix "B"); *Philadelphia Gear Corp. v. American Pfauter Corporation*, 100 F.R.D. 58 (E.D.Pa. 1983); *Schroeder v. Lufthansa German Airlines*, 18 Av. Cas. (CCH) 17, 222 (1983); *Volkswagenwerk Aktiengesellschaft v. Superior Court, Alameda County*, 123 Cal. App. 3d 840, 176 Cal. Reprtr. 874, 881 (Ct. App. 1981); *Pierburg GmbH & Co. KG. v. Superior Court of Los Angeles County*, 137 Cal. App.3d 238, 136 Cal. Reprtr. 876 (Ct. App. 1982) the courts have held that discovery involving German nationals in the Federal Republic of Germany must be initiated in accordance with the Evidence Convention. Contrary, in *Graco, Inc. v. Kremlin, Inc.*, No. 81 C 368 (N.D. Ill. April 13, 1984); *Murphy v. Reisenhauser KG Maschinenfabrik*, No. C/A 81-368 (D.Vt. April 14, 1984), and *Lasky v. Continental Products Corporation*, 569 F.Supp. 1227 (E.D.Pa. 1983) the Evidence Convention was held to supplement, rather than to supplant, the Federal Rules of Civil Procedures.

⁶ Supplemental Brief in Opposition to Petition for Writ of Mandamus, p. 2.

through channels other than those provided for in Article 2;

- b) permitting by internal law or practice, any act provided for in this Convention to be performed upon less restrictive provisions;
- c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention;

Under these provisions the Federal Republic of Germany has the right to declare that it would also permit discovery by means other than by Letters of Request. Article 27 does not permit the U.S. District for the Eastern District of Louisiana to provide for an alternate method of taking evidence in Germany, such as under the Federal Rules of Civil Procedure.⁷

Therefore, Article 27 of the Convention does not support the argument that the Evidence Convention is permissive, it merely states that incoming requests can be executed more liberally than required under the minimum compliance standards agreed to by the contracting States in the Convention. To hold that the Evidence Convention is applicable at the discretion of the trial judge would make this Convention meaningless.

The Federal Republic of Germany's insistence on permitting only the Letters of Request procedure for the compulsory taking of evidence in Germany is based on the principle that the taking of evidence in connection with a court proceeding is a sovereign act under German law. Other civil law countries also adhere to this principle which is applied regardless whether the taking of evidence is performed by a court or an attorney of record in foreign

⁷ See *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. at 60; Explanatory Report on Evidence Convention, 12 I.L.M. at 341.

litigation. Compliance in Germany with the order of the U.S. District Court mandating the taking of oral depositions in Kiel, Germany, and the production of documents located in Kiel, Germany, would be a violation of German sovereignty unless the order is transmitted and executed by the method of Letter of Request under the Evidence Convention.

b) The Federal Republic of Germany is aware that the federal and state courts that have considered the applicability of the Evidence Convention have concluded that, regardless of whether the Convention establishes pre-emptive and exclusive rules of discovery, the principles of international comity strongly counsel that, as a matter of judicial self-restraint, a court order parties to abide by the Convention.⁸ The Federal Republic of Germany agrees with the reasoning expressed in recent decisions of American courts⁹ that parties should proceed in the manner set forth in the Evidence Convention before seeking further resort from the court.

The treaty is the only basis on which compulsory evidence may be taken in the Federal Republic of Germany for use in litigation before American courts; the principles of comity among nations governed judicial assistance prior to the Convention. The Convention as a treaty between the two countries supersedes the Federal Rules of Civil Procedure whenever their application would result in actions that violate the sovereignty of the Federal Republic of Germany.

⁸ See *General Electric Co. v. North Star Int'l., Inc.*, No. 83-C-0838, N.D. Ill., at 4.

⁹ *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. at 61; *Volkswagenwerk AG. v. Superior Court, Alameda County*, 123 Cal. App. 3d at 858.

III. The Evidence Convention is not rendered inapplicable by the District Court having in personam jurisdiction over the German defendant.

The District Court in its ruling of April 13, 1984, stated:

The Court has jurisdiction over Anschuetz. Anschuetz can produce the documents in the United States, and be subject to our discovery provisions. The Treaty was not designed to create a Chinese Wall among nations. It was designed to facilitate the securing of evidence among various nations, giving due deference to the various differences which exist within their judicial systems. (Transcript of hearing of April 13, 1984, p. 8).

The Evidence Convention does not include any provisions with reference to the jurisdiction of the courts of the nations which are signatories do it. The Convention provides for means of taking evidence regardless of whether the court has jurisdiction over a particular party or witness.

Under the Evidence Convention a U.S. Court can compel a foreign witness to give evidence. The Federal Republic of Germany permits the compulsion of witnesses to give testimony in its territory provided the requesting court abides by the Evidence Convention. Accordingly, the Evidence Convention cannot only be seen as a means to limit or restrict the evidentiary rules within the United States, it also enlarges them to a considerable degree. The applicability of the Convention is not dependent on any statutes or laws conferring jurisdiction.¹⁰

¹⁰ See *Falzon*, 100 S.Ct. 1819, Brief of U.S. as amicus curiae, at 7 n.3.

IV. Past experience with requests for the taking of evidence in the Federal Republic of Germany indicates cooperation by German courts and authorities.

The German Law of Civil Procedure does not provide for pre-trial discovery.¹¹ However, past experience shows that litigants can expect cooperation by German Central Authorities and Courts in the execution of requests for pre-trial discovery under the Convention.

a) *Depositions*: A Letter of Request to take oral depositions under the Hague Convention was the subject of an appeal to the Court of Appeals Munich (O.L.G. Munich) which is attached hereto and marked Appendix C.¹² The German court cited as the guiding principle governing execution of Letters of Request:

...the desire of the Federal Republic of Germany to place judicial assistance with the United States, which previously was carried out only on the basis of comity on a solid treaty basis, and to take due account of the procedural device of pre-trial discovery which is unknown in German procedural law, but not unfamiliar to Germany's treaty partner. (Appendix C, p. 13)

Pursuant to this guiding principle, the German Court rejected challenges to the form and substance of the Letter

¹¹ See Appendix C, p. 14.

¹² In *Corning Glassworks v. International Telephone & Telegraph Corp. (ITT)*, No. 76-0144 (D.Va. 1976) the U.S. District Court for the Western District of Virginia addressed a Letter of Request to the Bavarian Ministry of Justice as Central Authority for the taking of depositions of corporate officers and employees and the production of documents. With judgment of October 31, 1980 the O.L.G. confirmed the refusal by the Central Authority for production of documents and with judgment of November 27, 1980 the Court rejected challenges to the taking of oral depositions.

of Request and held that the broad scope of the examination of the witnesses requested would not be in conflict with important and governing principles of German law, nor in violation of public policy.

Counsel for one of the parties present at the taking of the oral depositions in this case in Munich expressed his satisfaction with the procedure as follows:

To the credit of the presiding German judge, once the initial procedural hurdles were overcome, the depositions, which did not commence until June 1981, were conducted in a remarkably orderly and efficient fashion. The judge agreed that the depositions could be held in a suitable simultaneous translation facility rather than in the local court as ordinarily required. The German judge undertook to study the documents and our summaries in advance. He proceeded to conduct an extensive examination of each witness in the first instance, after which he allowed us to examine the witness at length. Wide latitude was allowed in this follow-up examination. We were not limited to filling in the details of the judge's interrogation but were permitted to question areas not covered in the judge's initial examination. Six witnesses were examined on complex anti-trust issues over the course of four weeks.

Several novel procedures were employed to facilitate the depositions. A verbatim transcript was taken, rather than the judge's minutes as in the usual practice. The English questions were translated into German for the witnesses to answer. A transcript was recorded in German and then translated into English. A tape-recorder was uti

lized, perhaps for the first time in a German court.¹³

There is therefore no indication that pre-trial discovery by way of oral depositions cannot be effected in the Federal Republic of Germany under the Convention.

b) *Production of Documents*: The Federal Republic of Germany declared in pursuance of Article 23 of the Convention that it will not, in its territory, execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries.

The O.L.G. Munich in the above referred to Judgment of November 27, 1980 permitted the examination of witnesses concerning the origin, content, business purpose and economic impact of documents; it upheld the Central Authority's denial of the Request for the production of documents.¹⁴

On a previous occasion the Federal Republic of Germany has stated that under Article 23 of the Convention it would permit the production of documents deemed relevant and necessary by a U.S. Court to be used at trial.¹⁵

The Foreign Office and the Department of Justice of the Federal Republic of Germany have in connection with the preparation of this brief reviewed their position on the reservation to Letters of Request for the purpose of obtaining pre-trial discovery of documents and have authorized the attorney of record to convey to the Court the position of the Federal Republic of Germany as follows:

The Federal Republic of Germany recognizes that the reservation not to execute Letters of Request

¹³ Platto, *Taking of Evidence Abroad for Use in Civil Cases in the United States*, 16 Int'l Law. 575, 584, (1982).

¹⁴ Appendix C, p. 14.

¹⁵ *U.S. Steel v. Steag Handel GmbH*, C.A. No. 82-0140, (D.D.C. 1982), where this position was made part of the record.

issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries, was expressed at the time of the ratification of the Convention without the benefit of recent practical experiences. It intends to consider such experiences in connection with the promulgation of regulations for the implementation of the Evidence Convention.

CONCLUSION

The Federal Republic of Germany has shown herein that:

- a) its courts are guided by a spirit of cooperation when executing requests for judicial assistance under the Convention;
- b) it interprets requests liberally without insisting on strict compliance with formalities;
- c) it permits the taking of voluntary testimony before U.S. consular officers and diplomats;
- d) it permits the production of documents to be used at trial;
- e) it allows the examination of witnesses relating to documents, and
- f) it has in connection with this brief expressed its intention to consider the practical experience gained so far and to be gained in the future, in connection with the promulgation of regulations for pre-trial production of documents.

The Evidence Convention should therefore be complied with, including the reservations expressed by the signatories in accordance with Article 23 of the Convention. Only if the Convention is applied by U.S. courts to requests for taking evidence abroad, can it be determined by the courts and authorities of the Federal Republic of Germany

whether further modifications are desirable and justified. The outright refusal by the District Court to apply the terms of the Convention in the instant case would not further such process.

For the reasons stated above, the Federal Republic of Germany supports the Petition for Writ of Mandamus ordering and directing the recall of the orders of the District Court for the production of documents located in Germany and the taking of depositions in Germany.

Respectfully submitted,

Date: September 25, /s/ PETER HEIDENBERGER
1984

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 1984 I caused the foregoing Brief of the Federal Republic of Germany as amicus curiae to mailed, postage prepaid, to James O. M. Womack, Esq., Burke & Mayer, 1600 One Shell Square, New Orleans, Louisiana 70139, attorneys for Boh Brothers Construction Company, Neal D. Hobson, Esq., Miling, Benson, Woodward, Hillyer, Pierson & Miller, 1100 Whitney Bank Building, New Orleans, Louisiana 70130, attorneys for Anschuetz & Co. GmbH, and Campbell E. Wallace, Esq., Chaffe, McCall, Phillips, Toler & Sarpy, 1500 First National Bank of Commerce Building, New Orleans, Louisiana 70112, attorneys for Navera Santa Catalina, S.A.; CIA Gijonesa de Navegacion, S.A.

/s/ PETER HEIDENBERGER
PETER HEIDENBERGER

Appendix C

Judgment of 27 Nov 80

Translation from German
Docket No. 9 VA 4/80

**Petition for Review of an Administrative Ruling
under Secs. 23 et seq., EGGVG***

- 1) Siemens Aktiengesellschaft, Munich,
- 2) Siecor GmbH,
- 3) Bernd Zeitler,
- 4) Gerhard Blaimer,
- 5) Werner Schubert,
- 6) Dr. Wulf-Dieter Seiffert,
- 7) Dr. Hans Behnke,
- 8) Heinz Hirthe,

Petitioners

Attorneys of record: Dr. Jakob Strobl & Assoc.,
Maximilianplatz 10, 800 Munich 2,

against

the decision of the Bavarian Ministry of Justice of
2 June 1980, File No. 9341 E - I a l- 403/80

Concerning

the request for judicial assistance of the U.S. District Court
for the Western District of Virginia, Roanoke, Virginia
24006, dated 17 December 1979

issued in

Civil Case No. 76-0144

* Tr. note: "EGGVG" = Introductory Law to the Court Organization Act.

CORNING GLASS WORKS, CORNING, N. Y., USA,
v.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
320 Park Avenue, New York, N.Y. 10017, USA (ITT)

the 9th Civil Chamber of the Oberlandesgericht (Court of Appeals) Munich, composed of Dr. Schmadl, Presiding Judge, and Prof. Dr. Blomeyer and Dr. Naegelein, Judges, issues on 27 November 1980 the following

Decision:

- I. The petition of 7 July 1980 of the corporate petitioners Siemens AG and Siecor GmbH as well as of the individual petitioners Bernd Zeitler, Gerhard Blaimer, Werner Schubert, Dr. Wulf-Dieter Seiffert, Dr. Hans Behnke and Heinz Hirthe, who are named as witnesses, concerning the decision of the Bavarian Ministry of Justice of 2 June 1980 is dismissed for lack of merit.
- II. The Petitioners shall bear the costs of the proceedings.
- III. The value of the subject matter in dispute is assessed at 100,000 German Marks.

Reasons:

A.

In a suit pending since 1976 before the U.S. District Court for the Western District of Virginia, the American company Corning Glass Works, plaintiff, prosecutes against the American company International Telephone & Telegraph Corporation (ITT), defendant, claims for damages and injunctive relief because of defendant's alleged infringement of U.S. patents held by plaintiff for optical waveguide fibers; ITT has counterclaimed for damages al-

leging that Corning has misused its patents by entering into restrictive agreements with dominant telecommunications companies in the United States and throughout the world, including the Federal Republic of Germany.

On motion of ITT, the American court issued a Letter of Request on 17 December 1979 addressed to the Bavarian Ministry of Justice, based on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 18, 1970 (BGB1, 1977 II S. 1472); [the American court] requested that the individual Petitioners be examined by a court as witnesses and that the corporate Petitioners be ordered to produce numerous documents, identified in Schedule A to the letter of request, to the attorneys for the parties to the proceeding for inspection and copying. The complete text of the letter of request is contained in a certified translation prepared by a sworn translator for the English language, which translation is attached hereto as Enclosure 1 and forms part of this decision.

With an official reply of 2 June 1980 (9341 E 1 a - 403/80) - the full text of which is attached to this Decision as Enclosure 2 - the Bavarian Ministry of Justice complied with the request for the examination of witnesses. The request for production of documents was denied on the ground that that part of the request would involve a "discovery of documents" which, in accordance with Article 23 of the Convention the Federal Government declared it would not execute and which could not be executed pursuant to § 14(1) of the Implementing Law of 22 December 1977 (BGB1 S. 3105), since to date no implementing regulations have been issued under the authority of § 14(2) of the Implementing Law which would permit execution of such requests under certain conditions.

The petition of ITT of 1 July 1980 challenged the denial to order the production of documents; following this Court's review of the lawfulness of the administrative ruling pur-

suant to § 23 EGGVG, the petition was dismissed as being unfounded with a Decision issued by this Panel on 31 October 1980 (9VA 3/80), which Decision is attached as Enclosure 3, and to which reference is made for particulars.

With a brief dated 7 July 1980, received by the court the same day, the Petitioners here seek court review of the lawfulness of the approval of the request for an examination of witnesses (which approval was announced on June 6 1980) and the revocation of this approval on the ground that it constituted an unlawful administrative act which violated the civil rights of the individual Petitioners and the protected business interest of the corporate Petitioners in the enterprises established and carried on by them. The Petitioners contend that the requested examination of witnesses should not have been approved, since such approval would improperly force the individual Petitioners to testify as witnesses before a German judge in aid of a foreign proceeding and the corporate Petitioners could suffer considerable harm in their competitive standing against ITT world-wide. The letter of request of the American court was inadmissible because it disregarded numerous formal and substantive requirements mandated by the Convention; moreover, it was contrary to the German public policy ("ordre public") because it was inconsistent with fundamental principles of the German law of civil procedure: its purpose was to conduct a fishing expedition which is not sanctioned by German law.

With respect to the specific objections of each of the Petitioners, reference is made to their briefs of August 7, 1980 (Record 50/90), August 14, 1980 (Record 91/92) and September 9, 1980 (Record 108/113) together with their enclosures.

At the hearing held by this Panel on 7 November 1980, the matter was argued by counsel for the Petitioners and for ITT (Record 129/131).

B.

I.

The petition is admissible for all Petitioners pursuant to § 23 EGGVG since it sets forth clearly the alleged violation of their rights and has as its purpose court review of the legality of the examination of witnesses requested by the American Letter of Request and granted by the Bavarian Ministry of Justice - an act of judicial administration regulating an aspect of the law of civil procedure - and seeks the revocation of such action (Baumbach-Lauterback, 29th edition, § 23 EGGVG, Anno. 1 A, C; § 24 EGGVG, Anno. 2, 4; Annex to § 168 GVG, Anno. 1 A, 2 A); and since it was timely filed within the period of one month required by § 26(1) EGGVG (§ 29(2) EGGVG, § 22(1) FGG, §§ 187(1), 188(2), 193 BGB).

The alleged violation of rights not only concerns the individual Petitioners who, having been ordered [by the Ministry] to be examined as witnesses, are now required to appear and testify before a German judge in aid of a foreign court proceeding - an obligation which, as German citizens, they do not ordinarily have. The examination of witnesses which has been ordered would also interfere with the legally protected rights of the corporate Petitioners and not only with their "sphere of interests" - the latter would not provide sufficient grounds for seeking court review (Maunz/Duering, Anno. 34, 35 to Art. 19(4) Grundgesetz [Constitution]; Ule, VwGerichtsbarkeit, 2nd edition, § 42 VwGo § 42, Anno. III 2). In view of the nature of the legal proceedings pending before the American court and the purpose of the letter of request, it is obvious that ITT - a world-wide competitor of the corporate Petitioners in the field of electronics in general and of telecommunications in particular - seeks to ascertain facts regarding competition in that field. In consequence, the legally protected interests of the corporate Petitioners in the business enterprises established and carried on stand

to be adversely affected as regards its trade secrets in relation to their competitors.

II.

The petition, however, is not meritorious.

The order requiring the examination of the individual Petitioners issued by the Bavarian Ministry of Justice in its capacity as the competent "Central Authority" pursuant to Articles 2 and 35(1) of the Convention, § 7 of the [German] Implementing Law and Section B 1 of the announcement of 21 June 1979 (BGB1 II S. 780) was properly entered, so that the Petitioners' rights were not violated by an unlawful act of judicial administration (§ 28(1) EGGVG).

1) Petitioners argue that the request for the examination of witnesses should not have been approved at the outset because the counterclaim for treble damages asserted by ITT in the American proceedings on account of an alleged violation of the antitrust laws by Corning was punitive in nature and, therefore, the American Letter of Request was not issued in a "civil or commercial matter" within the purview of paragraph 1 of Article 1 of the Convention. The argument lacks substance. Aside from the fact that the Petitioners themselves concede that a full-fledged American civil suit is pending (brief of 7 August 1980, page 20), they overlook the fact that Corning, in its capacity as plaintiff, asserts damage claims with respect to patent infringements by ITT which are not in the form of "treble damage"; Petitioners would characterize these claims, too, as punitive in nature. We note in passing that German law recognizes claims for lump-sum damages, though they are subject to strict judicial scrutiny in the field of general conditions of trade, and [German law] recognizes the assertion of civil claims in a criminal proceeding pursuant to § 403, *et seq.* StPO [German Code of Criminal Procedure]. Therefore, there exists no reasonable doubt as to the pendency of American civil proceedings

within the purview of paragraph 1 of Article 1 of the Convention, in connection with which proceedings the Letter of Request was issued.

2) Contrary to the claim asserted here, there were no formal defects in the American Letter of Request and, therefore, there were no impediments to the approval of the request to the extent that it sought an examination of witnesses. In this connection, the following details are relevant:

a) It is true that the American Letter of Request was - contrary to the stipulation in Article 2, paragraph 2 of the Convention - not transmitted directly to the Bavarian Ministry of Justice as central authority by the requesting American court; according to the uncontroverted statement of the Petitioners, it was submitted by a representative of ITT. But, contrary to Petitioners' contention, this channel of transmission does not constitute a formal defect which would be fatal to an approval of the request by the Ministry of Justice. To begin with paragraph 2 of Article 2 of the Convention merely excludes the participation of any other authorities of the State of execution; it does not prohibit the transmission of the request [to the Central Authority] through a messenger. Secondly, it is of no moment to the present case - that § 6, para. 2 of the [German] Implementing Law to Article 10 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965 (BGBI 1977 II page 1453), to which the Federal Republic of Germany and the USA are parties, prohibits the "private service" of court documents. For the transmission of the American Letter of Request to the Bavarian Ministry of Justice does not constitute "service" of a court document in the sense of the above-mentioned Service Convention. Moreover, the American District Court has made express reference to its letter of Request of 17 December 1980 [*sic*; should be "1979"] in its follow-up letter of 19 February 1980 to the Bavarian Ministry of Justice, and

thus it must be deemed to have subsequently approved the way in which the Letter of Request was transmitted.

b) Petitioners claim that, contrary to paragraph 1(e) of Article 3 of the Convention, the addresses of the witnesses to be examined were missing in the letter of request; this constitutes a relatively minor formal defect. Petitioners themselves concede the insignificance [of the omission] and this also follows [from the requirement in the Convention] that an address be given "where appropriate". There was, therefore, no reason to reject the request on that basis. Individual Petitioners 3), 4), 7) and 8) also contend that they are not domiciled within the district of the "Amtsgericht" (County Court) of Munich although they are employed by the corporate Petitioners 1) and 2) in that district. They argue that if they are required to testify in the Amtsgericht Munich (which is the proper judicial authority within the meaning of paragraph 1, Article 9, of the Convention and § 8 of the [German] Implementing Law) they would be unconstitutionally deprived of the judge of their domicile as their legally competent judge (Article 101, para. 1, sentence 2, of the German Constitution; § 16, sentence 2 GVG [Court Organization Act]). The argument is devoid of merit. To begin with, the term "legally competent judge" refers to the judge who is competent to *decide* a legal controversy (Judgment of the Federal Constitutional Court, NJW 1964, 1020). The present case raises only the question which local judge is competent to execute a request for judicial assistance. Secondly, the venue provisions of § 8 of the Implementing Law are consistent with the venue provisions in paragraph 1 of § 157 GVG [Court Organization Act] for judicial assistance as between German courts, and are also in conformity with the venue provisions for proceedings for the perpetuation of evidence pursuant to § 486, para. 2 ZPO [German Code of Civil Procedure], according to which venue is proper at any place where the witness is to be found (Baumbach-Lauterback, § 157 GVG, Anno.1; § 158 GVG, Anno 2; OLG

Hamm MDR 57, 437; Zoeller, 12th edition, § 157(2) GVG venue may be concurrent in several courts in a given place. Therefore, it cannot be said that Petitioners 3), 4), 7) and 8) would be "deprived" of their legally competent judge if they were to be examined as witnesses by the Amtsgericht Munich, i.e., they will not be arbitrarily subjected to the powers of a judge who is not competent for them (Judgment of the Federal Constitutional Court 3, 359 (364); BGH [Judgment of the Federal Supreme Court] NJW 62, 1396).

3) Petitioners concede, and the Court agrees, that the "nature of the proceedings"—as required by paragraph 1(c), Article 3, of the Convention—is sufficiently specified in Item 2 of the Letter of Request, so that no impediment to the execution of the request is present. On the other hand, Petitioners' other formal objections - which are interrelated - are not without substance. Petitioners claim that the "necessary information in regard to the proceedings" [for which the evidence is required] - as required by paragraph 1(c), Article 3, is insufficient, and that the "questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined" (paragraph 1(f), Article 3, of the Convention) have not been furnished. These formal requirements - which, Petitioners say, have been insufficiently complied with or disregarded - go to the core of the conflict between German and American procedures, especially as regards fishing expeditions which are not permitted in German procedure.

But these formal objections raised by the Petitioners, which may have a considerable procedural impact, are in final analysis unfounded. It is true that in the language of the statement of facts in Item 2 of the Letter of Request with respect to the counterclaim of ITT, namely, "that, inter alia, the plaintiff misused its patents by entering into restrictive agreements with dominant telecommunications companies in the United States and throughout the world,

including the Federal Republic of Germany" - which forms the basis of the counterclaim - falls far short of the detailed statement of facts which is required by German procedural law. The text of the Letter of Request lacks specific references to occurrences, dates, events and material consequences with respect to which the witnesses are to be examined, which ought to be set forth if the questions to be put to the witnesses are not specified in the request (see the disjunctive "or" in Article 3, paragraph 1(f) of the Convention). However, these defects were not substantial enough to cause the Ministry of Justice, in its capacity as central authority pursuant to Article 5 of the Convention, to question the request (cf. also the letter of the "Amtsgericht" Munich of 16 July 1980, File No. AR 354/80, addressed to the American requesting court, asking for a list of questions to be put to the witnesses); nor were these defects so egregious as to require the rejection of the Letter of Request seeking the testimony of the witnesses.

The guiding principle mandating this result is the desire of the Federal Republic of Germany to place judicial assistance with the United States, which previously was carried out only on the basis of comity, on a solid treaty basis, as was done in the Convention on the Taking of Evidence here in question, and thereby also to take due account of the procedural device of "pre-trial discovery" which is unknown in German procedural law, but not unfamiliar to Germany's treaty partner, and which was described in the Decision of this Panel of 31 October 1980 (Docket No. 9 VA 3/80) as a fundamental part of an American civil proceeding. This follows clearly from the fact that the declaration under Article 23 of the Convention excludes "pre-trial discovery of documents", and from paragraph 2, Article 9, of the Convention which basically permits execution of a Letter of Request according to the special method or procedure of the requesting State to the limit of incompatibility with the internal law of the State

of execution under paragraph 1, Article 9, of the Convention.

This basic starting point⁹ virtually demands the interpretation of the Letter of Request, in the context of Item 3a (examination of witnesses) and b (production of documents), Item 4 and Schedule A, to the end that the witnesses named are to be examined with respect to the documents which are identified by date and subject matter as to their origin, content, business purpose and economic impact. Only to this extent does this Panel authorize the examination of the witness.

The scope of the examination of the witnesses thus authorized is not in conflict with important and governing principles of German law, in particular with German "*ordre public*" in the sense of a violation against the public morals or the policy of a German Law (Art. 30 EGBGB [Introductory Law to the German Civil Code]). Nor in the opinion of this Panel does such a holding amount to a disregard of the [German] declaration under Article 23 of the Convention. German law permits the examination of third persons as witnesses concerning the contents of documents, which documents themselves need not be surrendered or produced. Finally, there can be no question that the sovereignty or the security of the Federal Republic of Germany will be endangered (paragraph 1(b), Article 12, of the Convention). According to paragraph 1 of Article 9 of the Convention, and the relevant provisions of the German Code of Civil Procedure, the examination of witnesses will be conducted by a German judge, in the presence of an American judge familiar with the trial, whose participation has been approved by the Ministry in accordance with Article 8 of the Convention. This manner of proceeding sufficiently ensures that due consideration will be given to the testimonial privileges of the witnesses, in accordance with §§ 383 (1) No. 6, 384 ZPO [German Code of Civil Procedure], the right of the parties and their representatives to examine in accordance with § 397 ZPO, and the

limits of discovery of evidence, whose perimeters are doubtful even under German procedural law depending on the type of proceedings and the facts of the case (Peters, *Ausforschungsbeweis im Zivilprozess*, Beitrage zum Zivilrecht und Zivilprozess, 1966, Heft 16, S. 16, 49, 55, 60/63, 90/91, 120/126). In any event, the prohibition against fishing expeditions in German procedural law is designed for the protection of the adversary who is not required to make available to his opposing party the weapons for the conduct of the lawsuit (BGH NJW 1958, 1491); but it is not designed for the protection of witnesses who are sufficiently protected by the testimonial privileges provided by law (Peters, pages 58 et seq.).

4) The foregoing considerations also refute Petitioners' other objections, namely that Item 5a of the Letter of Request seeks to have the witnesses examined by the attorneys for the parties, which is contrary to German procedural law and the provisions of the Convention; Item 5c seeks permission for the participation of US judge Glenn Conrad. The Ministry of Justice did not comply with these items of the request. In view of this, the Petitioners have not been aggrieved.

5) Finally, the Petitioners contend that the request should not have been approved because it was issued at the "pre-trial discovery" stage of the proceedings and, therefore, the evidence was "not intended for use in judicial proceedings commenced or contemplated", as required by paragraph 2, Article 1, of the Convention. The Decision of this Panel of 31 October 1980 (9 VA 3/80) establishes, and the legal literature there cited teaches, that the "pre-trial discovery" stage not only presupposes a pending judicial proceeding before an American court, but that it is an essential part of the securing of evidence to be introduced at the "trial

III.

For the foregoing reasons, the Petitioners' rights were not violated by an unlawful act of judicial administration. Therefore, their petition must be dismissed as being without merit (§§ 23, 25, 28 EGGVG).

The decision as to costs follows from § 30 (1) EGGVG, § 2 N 130 (1) Kosto (Regulations on Costs).

The Panel assesses the value of the subject matter in dispute 100,000 DM, in accordance with § 30 (1) Ko on the basis of the estimated economical and personal interest of the Petitioners in the cancellation of the order approving their examination as witnesses.

AUG 21 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

SOCIETE NATIONALE INDUSTRIELLE AERO-
SPATIALE and SOCIETE DE CONSTRUCTION
D'AVIONS DE TOURISME,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,

Respondent.

(DENNIS JONES, JOHN and ROSA GEORGE,
Real Parties in Interest)

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF AMICUS CURIAE THE ITALY-
AMERICA CHAMBER OF COMMERCE, INC.
IN SUPPORT OF PETITIONERS**

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August 21, 1986

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IN THE
Supreme Court of the United States

October Term, 1985

No. 85-1695

**SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE
and SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISME,**
Petitioners,

v.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,**

Respondent.

**(DENNIS JONES, JOHN and ROSA GEORGE,
Real Parties in Interest)**

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**BRIEF OF *AMICUS CURIAE* THE ITALY-
AMERICA CHAMBER OF COMMERCE, INC.
IN SUPPORT OF PETITIONERS**

Interest of Amicus Curiae

The Italy-America Chamber of Commerce, Inc. (the "Chamber") is a voluntary membership organization which has been active in the promotion of trade relations between the United States and Italy since 1887. Members include importers, exporters, agents of Italian businesses trading in the United States, United States businesses with subsidiaries or business in Italy, banks, shipping lines, airlines, freight forwarders, and advertising and public relations

firms. The Chamber is submitting this brief with the consent of petitioners and respondents, real parties in interest.

The Chamber has an interest in this appeal because the failure of American courts to exercise judicial restraint in favor of the procedures set forth in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 28 U.S.C.A. § 1781 (Supp. 1986), 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Italy on Aug. 21, 1982) ("Hague Evidence Convention" or "Convention"), is placing an increasing strain on trade relations between the United States and Italy.

The litigiousness of American society, the free rein given to attorneys to obtain evidence without direct judicial participation, the vast resources routinely allocated to litigation in the United States, and the significant additional expense, logistical burden and uncertainty of defending lawsuits in a different language and a unique legal culture cause many foreign businesses, including small and medium-sized companies with attractive and competitive products and services, to take their business elsewhere. Many businesses which do begin to sell to Americans abandon the market after their first shocking experience not with substantive legal principles but with American litigation procedures and costs. This results in business losses or lost business opportunities for American and foreign companies alike and poses a threat to the commercial climate necessary for trade upon which members of the Chamber depend to do business.

The Hague Evidence Convention was intended to ease the international friction which developed in cases in which the courts of two nations with fundamentally different legal systems have legal responsibilities. If American courts use the Convention, they will eliminate a barrier to trade and a

source of international friction. If American courts do not use it, judicial cooperation will give way to a reactionary cycle. That cycle may include revocation of the Convention, legislation or additional reservations limiting the Convention's scope or usefulness, or refusals to enforce the judgments of American courts. It is in the interest of the members of the Chamber and of all entities or individuals engaged in trade with civil law countries to prevent such a cycle.

Statement

This case arose from a plane crash near New Virginia, Iowa, on August 19, 1980. (Pet. 4)* Respondents allege that the plane designed and manufactured by petitioners was defective and seek damages for personal injuries on a products liability theory. *Id.*

Respondents served on petitioners several requests for admissions, a request for production of documents, and a set of interrogatories. *Id.* Petitioners moved for a protective order to require that evidence be taken in accordance with the provisions of the Hague Evidence Convention. *Id.* Petitioners informed the court that, to the extent they had documents or information responsive to respondents' requests, they were located in France, and that the French "blocking statute" (Code pénal art. 538) prohibited their disclosure except in accordance with the Convention. *Id.* The magistrate denied the motion and explained that his

* References to the petition for writ of certiorari in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, will be cited as "Pet. —"; references to the Appendix to that Petition will be cited as "Pet. App. —"; references to the opinion below, *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir.), cert. granted sub nom. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 106 S. Ct. 2888 (1986) will be cited as "Op. —."

decision was based upon his "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts." (Pet. App. B at 24a) The magistrate also speculated that the French blocking statute was not strictly enforced in France. (Pet. App. B at 23a-24a)

The Court of Appeals for the Eighth Circuit held that the Convention did not apply to the discovery requests because the court had personal jurisdiction over the foreign litigant. (Op. 127) The Eighth Circuit recognized that the effect of its decision would be to restrict the scope of the Convention to requests for evidence from individuals and entities which American courts find not to be subject to their jurisdiction or compulsory powers. (Op. 125) The court cited no authority for such a restriction, either in the language or in the history of the treaty; it relied on decisions of collateral courts which, in turn, had failed to cite any authority in the treaty language or history. (Op. 125-126) The Court of Appeals also held that considerations of comity did not require any deference to the French blocking statute and ordered that discovery proceed pursuant to the Federal Rules of Civil Procedure ("Federal Rules"). (Op. 127)

Summary of Argument

The Hague Evidence Convention imposes binding obligations on all signatories to use it.

The purpose of the Convention was to establish a comprehensive system of obtaining evidence located abroad and to end international friction. The specific intent of the President and the Senate was to promote the Convention's procedures as the principal means of obtaining evidence located abroad. The purpose of the Convention and

the intent of the United States can only be served, therefore, if American courts and litigants are required to use it.*

The Convention must be construed to require its use or it lacks the reciprocity essential to any treaty. An interpretation which construes the Convention as binding upon an American court only when the court finds that it does not have personal jurisdiction over the foreign individual or entity with control over the evidence deprives civil law signatories of the benefit of their bargain and renders the Convention meaningless for all practical purposes.

The language of the Convention reflects the intent of the signatories to limit evidence-taking procedures to those set forth in the Convention and to any other procedures expressly allowed by the requested state in its internal law or practice or in other treaties. Procedures not allowed under the Convention or otherwise accepted by the requested state are not available to American courts or litigants.

The Convention is not, as some courts have suggested, an optional alternative to the Federal Rules. It creates special rules for the special circumstance of obtaining evidence located abroad. To the extent there is any conflict between the Convention and the Federal Rules, the obligation of the American court is to construe the Federal Rules so that they do not conflict with the subsequent and more specific treaty; it is not to distinguish and limit the treaty so that it does not affect the earlier and more general Federal Rules.

* Although the issue is presented to the Court in the context of discovery requests in a federal court, the decision of the Court will extend to discovery in state court proceedings by virtue of the Supremacy Clause. U.S. Const. art. VI, cl. 2.

Judicial restraint is needed to effectuate the purpose of the treaty and the intent of the signatories. A substantial body of case law demonstrates, however, that lower courts will not exercise restraint unless this Court requires them to do so. What is needed is a ruling which directs American courts not to enter orders compelling discovery under domestic rules at least until the record is clear that the parties have exhausted the Convention's procedures.

Use of the Convention would not create an impediment to litigation in American courts. There is substantial evidence that the Convention's procedures produce the needed results when attorneys use them with the same degree of care as is needed to obtain discovery under domestic rules.

Neither "minimum contacts" jurisdiction nor the concept of compulsory taking of evidence without direct judicial participation has developed in the internal law or practice of the United States' civil law trading partners. As a result, the exercise of jurisdiction to compel American-style discovery from foreign parties with no actual physical presence in the United States has become a principal source of friction between otherwise friendly nations. Judicial restraint is especially necessary, therefore, when an American court's jurisdiction is based on minimum contacts.

General principles of comity and customary international law are not alternatives to use of the Convention, and comity analysis is not appropriate unless the Convention's procedures have been exhausted. Until that time, comity is just another reason why American courts must exercise judicial restraint and litigants must resort to the Convention.

ARGUMENT

I.

The Hague Evidence Convention Imposes Binding Obligations on All Signatories to Use It.

A. The Purpose of the Convention Was to Establish a Comprehensive System of Obtaining Evidence Located Abroad and to End International Friction.

The purpose of the Convention was to establish an international system of obtaining evidence which was "tolerable" to the state of execution and which produced evidence "utilizable" in the requesting court. Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, S. Exec. Doc. A, 92d Cong., 2d Sess. 11 (1972) ("Amram, *Explanatory Report*"); Message from the President, Letter of Transmittal, S. Exec. Doc. A at III ("Letter of Transmittal"); Report of the United States Delegation to the Hague Convention, *reprinted in* 8 I.L.M. 785, 806 (1969) ("1969 U.S. Report"). Some civil law countries already had a long tradition of extending judicial assistance to American courts, but even in those states the Convention substantially improved the mechanisms for obtaining such assistance and extended assistance into new areas. Compare Gori-Montanelli & Botwinik, *International Judicial Assistance — Italy*, 9 Int'l Law. 717 (1975) (judicial assistance prior to Italy's ratification of the Convention) with Instrument of Ratification (Italy) (entered into force Aug. 21, 1982), *reprinted in* 28 U.S.C.A. § 1781, n.6a (Supp. 1986) (ratifying the Convention and allowing, *inter alia*, for Italian judicial compulsion in aid of consular and commissioner depositions).

The United States Government initiated the negotiations which led to the Convention, and in the final version

obtained almost everything it requested from the other participants. See 1969 U.S. Report at 805; Amram, *Explanatory Report* at 13. American drafters played a leading role in formulating the final product. Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning its Scope, Methods and Compulsion*, 16 N.Y.U. J. Int'l L. & Pol. 1031, 1031 n.2 (1984) ("Radvan, *Hague Convention*").

The United States Delegation, President and Senate all hailed the Convention as a major step forward in international judicial cooperation and as *the* method of obtaining evidence from foreign states without encountering the international friction associated with prior attempts to apply American discovery procedures abroad. See Letter of Transmittal; Letter of Submittal from Secretary of State William P. Rogers to the President Regarding the Evidence Convention, S. Exec. Doc. A at VI; Amram, *Explanatory Report* at 27. The Senate Committee predicted that letters of request would become a "principal means of obtaining evidence abroad." S. Exec. Rep. No. 25, 92d Cong., 2d Sess. 1 (1972).

B. The Convention Must Be Construed to Require Its Use or It Lacks Reciprocity.

This Court has recognized that a treaty is contractual in nature, and that treaty obligations should be construed "so as to effect the apparent intention of the parties to secure equality and reciprocity between them." *Factor v. Laubheimer*, 290 U.S. 276, 293 (1933).

The intent of the United States in signing and ratifying the Convention was to improve the system of international judicial cooperation, to facilitate the American discovery process, and to require civil law countries to amend their civil codes to accommodate the needs of American courts.

See Letter of Transmittal; Amram, *Explanatory Report* at 11.

The civil law countries negotiated and ratified the Convention primarily in order to have some reasonable limits placed upon the American exercise of extraterritorial jurisdiction to obtain evidence located in civil law countries. See 1969 U.S. Report at 806-07; *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983); Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Convention*, 37 U. Miami L. Rev. 733, 767 (1983) ("Oxman, *Impact of the Hague Convention*").

A judicial interpretation which construes the Convention as binding only when an American court finds that it does not have jurisdiction at all is, from the civil law perspective, an attempt to deprive civil law countries of the benefit of their bargain. See Radvan, *Hague Convention* at 1033, n.7 & 1036. That attempt is quite successful when the foreign national is denied any meaningful right of appeal. See, e.g., *Boreri v. Fiat S.p.A.*, 763 F.2d 17, 20 (1st Cir. 1985).

The language and history of the Convention do not lend any support to an interpretation which reduces the Convention to an optional device whenever the court of origin has jurisdiction over the person or entity with custody of or control over the evidence. The discussion among the delegates regarding the scope of the treaty concerned the meaning of the term "civil or commercial matters," and never touched upon the question of jurisdiction. See Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in 24 I.L.M. 1668, 1671-72 (1985) ("1985 Report"); Report of the United States Delegation

to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 I.L.M. 1417, 1417-18 (1978) ("1978 U.S. Report"); Report of the Special Commission on the Operation of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 I.L.M. 1425, 1426-27 (1978) ("1978 Report"); Amram, *Explanatory Report* at 11 & 27; 1969 U.S. Report at 808.

It is improbable that the representatives of states extremely sensitive to American assertions of jurisdiction would neglect to mention the concept of jurisdiction if it had anything to do with the scope of the treaty. *See* Point II. C *infra* pp. 15-16.

It is illogical that the various states would go to the trouble of negotiating and ratifying a treaty, and that civil law countries would establish Central Authorities and amend their civil codes, if they thought the United States would use the treaty only when an American court found that it did not have jurisdiction over the foreign national.

It is inconceivable that civil law countries would agree to a treaty which obligated them to amend their civil codes and to accommodate common law practices, unless they obtained as consideration a commitment from the United States to use the treaty.

C. The Convention's Rules Must Be Followed Unless the Requested State Expressly Allows Other Procedures.

Articles 27 and 28 of the Convention provide that a contracting state may permit procedures for obtaining evidence within its territory even if those procedures are not included in the Convention. Convention arts. 27-28. Additional procedures are available if they are allowed under

the internal law or practice of the requested state or under a separate agreement. Different procedures are *not* permitted if they are not available under the local law and procedures of the requested state, or if they are not made available under the terms of another diplomatic agreement. *See* Amram, *Explanatory Report* at 39-40; Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. Pa. L. Rev. 1461, 1476-77 (1984) ("Comment, *Mandatory Procedures*").

D. The Convention Establishes Special Procedural Rules Which Are Equally as Binding as the Federal Rules of Civil Procedure.

The obligation of American courts is to interpret a statute so that it does not violate a subsequent treaty or interfere with foreign law. *See* Restatement (Third) of the Foreign Relations Law of the United States § 321 comment a (Tent. Final Draft 1985) ("Restatement (Third)") ("international obligations survive any restrictions in domestic law"); *see also* Restatement (Second) of the Foreign Relations Law of the United States § 138 comment a (1965) ("Restatement (Second)"). The obligation of American courts is not to limit the application of a treaty so that it does not conflict with a prior statute. Yet that is precisely what the majority of lower federal courts have done in considering the Convention. Pet. 11 & n.23 and cases cited therein.

A treaty creates special rules for international relationships and is presumed to leave domestic law intact to the extent domestic law applies to internal matters. *See* Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 Colum. J. Transnat'l L. 230, 256-57 (1986) ("Heck, *U.S. Misinterpretation*").

When a treaty and a statute do conflict, the treaty supersedes the statute in the international context because it is the more specific rule. See Akehurst, *The Hierarchy of the Sources of International Law*, 1974-75 Brit. Y.B. Int'l L. 273; Comment, *Mandatory Procedures* at 1485. Moreover, a later treaty supersedes an earlier statute to the extent the two are inconsistent. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Voorhees v. Fischer & Krecke*, 697 F.2d 574, 575-76 (4th Cir. 1983); Restatement (Second) § 141(1).

There is no real conflict, however, between the Federal Rules and the Convention because they share the same basic goal: to obtain evidence in a form utilizable at trial. See Heck, *U.S. Misinterpretation* at 256-57. The Federal Rules provide the general statutory framework for obtaining evidence in federal courts, and the Convention sets forth specific procedures for obtaining evidence with a minimum of interference in the interests of other signatories. Each set of rules is equally "binding" upon the federal courts. The Convention conflicts with the Federal Rules only if a federal court erroneously insists upon compliance with general domestic rules when more specific international rules are applicable.

II.

Judicial Restraint Is Needed to Effectuate the Purpose of the Hague Evidence Convention.

A. American Courts and Litigants Will Use the Convention Only if This Court Requires Judicial Restraint.

When the Special Commission on the Operation of the Hague Evidence Convention met in 1985 to assess the operation of the Convention, it concluded that, on the whole, the application of the Convention was satisfactory

but the Convention was insufficiently used. The representatives "deplored" this situation. 1985 Report at 1670.

In order for the Convention's procedures to work in American lawsuits, American lawyers must use them. The case law demonstrates, however, that most American litigants are unwilling to use the Convention voluntarily and that courts have been very reluctant to require the Convention's use. See, e.g., *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985), cert. granted sub nom. *Messerschmitt Bolkow Blohm GmbH v. Walker*, 106 S. Ct. 1633 (1986); *In re Anschuetz & Co.*, 754 F.2d 602, 611, 615 (5th Cir. 1985), petition for cert. filed sub nom. *Anschuetz & Co. v. Mississippi River Bridge Authority*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98); *Lowrance v. Michael Weinig, GmbH, Kommanditgesellschaft*, 107 F.R.D. 386 (W.D. Tenn. 1985); *Work v. Bier*, 106 F.R.D. 45 (D.D.C. 1985); *Slauenwhite v. Bekum Maschinenfabriken, GmbH*, 104 F.R.D. 616 (D. Mass. 1985); *International Society for Krishna Consciousness v. Lee*, 105 F.R.D. 435 (S.D.N.Y. 1984); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 517-24 (N.D. Ill. 1984); *Wilson v. Lufthansa German Airlines*, 108 A.D.2d 393, 489 N.Y.S.2d 575 (1985); *Dorin v. Club Mediterranee, S.A.*, No. 4777/82 (N.Y. Sup. Ct. Jan. 5, 1983) (Hague Evidence Convention does not apply because the French defendant "has not denied that it does business in this state . . ."), *aff'd mem.*, 93 A.D.2d 1007, 462 N.Y.S.2d 524 (1983), appeal dismissed and cert. denied, 105 S. Ct. 286 (1984). In each of the decisions cited above, the court held that the Convention did not apply where the requested party was subject to the court's jurisdiction. See also Radvan, *Hague Convention* at 1053 & n.111.

The intent of the United States and of the other contracting states will be served only if this Court directs American

courts to refer litigants to the Convention in the first instance and precludes them from compelling discovery under domestic rules until the parties have exhausted their remedies under the Convention. Only such a ruling will allow the Convention to develop into the broad system of international judicial cooperation it was intended to be.

B. Use of the Convention Will Not Create an Impediment to Discovery.

The magistrate's "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts" (Pet. App. B 24a) reflects the widespread assumption among American judges and lawyers that resort to the Convention will lead to unreasonable delay, and that an attempt to obtain evidence through the Convention would be a futile exercise. There is no basis for this assumption, and there is substantial evidence to the contrary.

Reservations under Article 23 of the Convention notwithstanding, documents may be obtained in the normal course of a civil law court's execution of a letter of request. 1985 Report at 1672; see Heck, *U.S. Misinterpretation* at 244-45 (discussing the German Code of Civil Procedure [Zivilprozessordnung] §§ 424-25); Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 Int'l Law. 465, 482-83 (1983) ("Shemanski, *Obtaining Evidence*").

The Convention's procedures work when they are used by attorneys who take the time to learn them and to use them properly. See Platto, *Taking Evidence Abroad for Use in Civil Cases in the United States—A Practical Guide*, 16 Int'l Law. 575, 579-85 (1982); Radvan, *Hague Convention* at 1040; Shemanski, *Obtaining Evidence* at 482-83;

see also Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence for Use in Litigation in the United States*, 13 Int'l Law. 35, 37 (1979).

Moreover, the process of refining and expanding the Convention is continuing and holds great promise for the future. See 1985 Report at 1672; 1978 U.S. Report at 1417, 1433-34.

Under the Convention, American courts and litigants have an opportunity for the first time to oblige foreign courts to accommodate American procedures to the maximum extent possible under local law. See Convention art. 9. Prior to the Convention, as a matter of international law, American courts never had the authority to insist on extra-territorial application of their procedural law. See Brief for the United States as *Amicus Curiae* at 9 n.10, *Club Mediterranee, S.A. v. Dorin*, appeal dismissed and cert. denied, 105 S. Ct. 286 (1984), reprinted in 23 I.L.M. 1332, 1338 n.10 (1984), citing Oxman, *Impact of the Hague Convention* at 751; Heck, *U.S. Misinterpretation* at 235 ("Procedural law [is] traditionally a strict matter of local law...").

It is no wonder, therefore, that the United States Government lobbied for the treaty and hailed it as a great step forward in international judicial cooperation. The only mystery is why American courts choose to ignore it.

C. Judicial Restraint Is Especially Needed When Jurisdiction Is Based Upon Minimum Contacts.

The reaction of civil law states to orders compelling their nationals to submit to discovery under domestic American rules is particularly bitter when a court bases its action upon expansive American concepts of "long arm" jurisdiction based on "minimum contacts."

Minimum contacts jurisdiction is a relatively recent phenomenon even in American jurisprudence. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945). It coincided with the expansion of international commerce. However, neither minimum contacts jurisdiction nor the concept of compulsory taking of evidence without direct judicial involvement has developed in the internal law of the United States' civil law trading partners. As a result, the frequent exercise of jurisdiction to compel American-style discovery from parties with no actual physical presence in the United States has become a principal source of friction between otherwise friendly nations. *See* Restatement (Third) § 437 reporter's note 1 (Tent. Draft No. 7, 1986); Carter, *Obtaining Foreign Discovery and Evidence for Use in the United States: Existing Rules and Procedures*, 13 Int'l Law. 5, 5-7 (1979); Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents in Violation of the Law of the Situs*, 64 Nw. U.L. Rev. 487, 506-25 (1979); Robinson, *Compelling Discovery and Evidence in International Litigation*, 18 Int'l Law. 533, 533-34 (1984) ("Robinson, *Compelling Discovery*").

Davis Robinson, when he was Legal Advisor to the United States Department of State, described the typical foreign reaction to expansive assertions of jurisdiction in the following terms: "leaders like Prime Minister Thatcher, looking at the assertion of U.S. rights to regulate or control conduct within their own country, are likely to be heard asking, 'who is in charge here?'" Robinson, *Compelling Discovery* at 534.

When American courts exercise broad jurisdictional powers not only to regulate substantive conduct but to specify litigation procedures to be used abroad, international friction is inevitable and sets back the cause of international judicial cooperation.

III.

Principles of Comity and Customary International Law Require Use of the Convention in the First Instance.

Comity entails a consideration of the rights of the litigants "having due regard both to international duty and convenience . . ." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

General principles of international law provide that, when the courts of two countries have claims to jurisdiction over the same controversy, the American court must determine whether or not to exercise jurisdiction by evaluating its own as well as the other state's interest. *See* Restatement (Third) § 403(3) (Tent. Draft No. 7, 1986).

An American court's obligation is not limited, however, to evaluating interests. Under comity analysis, even when an American court rightly concludes that American interests outweigh foreign interests, the court must make a good faith effort to accommodate the conflicting interests of the other state and adopt compromise solutions designed to reconcile domestic and foreign interests. *See* Restatement (Second) § 40(a).

The Convention sets forth those compromise solutions. *See* Point I. A *supra* pp. 7-8. Until the Convention's procedures have been used, American courts should look no further.

CONCLUSION

During the 1978 meeting of the Special Commission on the Operation of the Hague Evidence Convention, France presented a positive and exciting vision of international judicial cooperation. The French expert proposed that the Central Authorities be "tighten[ed] up . . . in order to obtain other mutual services such as information on the status of a proceeding, on the content of foreign law, etc." 1978 Report at 1434.

The power to realize France's vision of expanding international judicial cooperation lies with this Court. If the Court requires that American courts exercise judicial restraint, then the international system will have a chance to function, friction will give way to understanding, and the interest in obtaining evidence in a specific case will coincide with the broader public interest. If the Court allows American courts to continue to ignore the treaty, international judicial cooperation will be an idea whose time has come, and gone.

For the reasons set forth, petitioners are entitled to a decision in their favor.

Respectfully submitted,

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August 21, 1986

AUG 22 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

SOCIÉTÉ NATIONALE INDUSTRIELLE AEROSPATIALE AND
SOCIÉTÉ DE CONSTRUCTION D'AVIONS DE TOURISME,

Petitioners,

—v.—

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF IOWA,

Respondent.

(DENNIS JONES, JOHN and ROSA GEORGE,
REAL PARTIES IN INTEREST)

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF AMICUS CURIAE
THE REPUBLIC OF FRANCE IN SUPPORT
OF PETITIONERS**

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INTEREST OF THE REPUBLIC OF FRANCE AS *AMICUS CURIAE*

The Republic of France submits this brief *amicus curiae* upon the consent of the parties to this proceeding. The Republic of France is a party to the multilateral Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 28 U.S.C. § 1781 (Supp. 1986), 23 U.S.T. 2555, T.I.A.S. No. 7444 (the "Hague Convention" or the "Convention"), a treaty to which the United States and sixteen other sovereign nations are also signatories. The Convention sets forth procedures for the taking of evidence in one signatory country for use in civil proceedings in another. The court below erroneously affirmed an order permitting United States litigants seeking evidence situated in France to disregard Convention procedures so long as the persons from whom the discovery is sought are parties to the litigation and subject to the American court's *in personam* jurisdiction. In order to so hold, the court below impermissibly read into the Convention a crucial limitation that is unsupported by the language or the negotiating history of that agreement. The lower court's holding also undermines one of the essential purposes of the Convention, the prevention of conflicts between different judicial systems with overlapping sovereignty.

The Republic of France has an evident interest in regulating actions taken on French territory to carry out foreign discovery demands. Moreover, French law makes it a criminal offense for persons subject to French jurisdiction to comply with foreign evidentiary demands unless they are consistent with the provisions of a treaty such as the Hague Convention. The lower court's decision is directly in conflict with French law, as well as with the French sovereign interests that it expresses.

The Republic of France is a signatory to the Hague Convention, and its citizens are engaged in substantial international commerce and attendant litigation. It is a close trading partner and long-standing ally of the United States, with which it shares a long and proud tradition of democratic government

and justice under law. It is also the nation whose sovereign interests will be directly and materially infringed by any attempt to implement the discovery program upheld by the lower court. The Republic of France thus has a substantial interest in the outcome of this appeal.

SUMMARY OF ARGUMENT

The delegates to the Hague Convention, who represented nations with different judicial systems that had all embraced different, yet effective, methods for the trial of civil and commercial matters, recognized that there is no judicial system of universal applicability. Thus, the Convention was not intended to codify one nation's rules. Instead, the drafters sought to find a common ground to resolve the international friction caused by one nation's application of its domestic discovery rules in another's territory. The Convention was designed to enable litigants engaged in the broad panoply of civil litigation to obtain evidence admissible in the forum state without violating the sovereign interests of the nation from whose territory that evidence was to be collected.

The Republic of France ratified the Hague Convention intending it to provide the sole means by which discovery demands emanating from other signatory countries would be carried out on French soil. The French Code of Civil Procedure was extensively amended in order to make the Convention procedures an integral part of domestic French law. French criminal law was correspondingly revised to prohibit French nationals from complying with foreign demands for evidence situated in France except where the demand is issued in accordance with the Hague Convention or another treaty to which France is a party.

The court below upheld a discovery demand aimed at the collection of evidence located in France that openly flouts Hague Convention procedures. In so doing, the court confronted the French parties controlling the evidence with equally

unacceptable alternatives: defy French criminal law or risk sanctions in the United States proceeding. The lower court's rationale—that the Convention does not apply if the target of the discovery demand is itself a party to the litigation—is at odds with the language and negotiating history of the Convention. The holding below frustrates the Convention's objective of reducing tensions between nations with different judicial systems precisely in those cases where the potential for conflict is greatest: evidence situated abroad is invariably at issue where, as here, one or more of the parties is a foreigner with no ties to the United States other than participation in commerce.

The lower court's decision to disregard the Hague Convention is unwise from the viewpoint of international judicial relations. It is also entirely unnecessary to the effective gathering of evidence in this or similar cases. Contrary to the lower court's suggestion, Hague Convention procedures do not impose undue burdens or restrictions on American litigants seeking evidence in France. In most cases, voluntary compliance by the recipient of the demand results in discovery coextensive with that available under traditional American rules, with no significant delays or incremental costs imposed on either party. In the isolated instances where the party from whom discovery is sought declines to cooperate voluntarily, French courts possess evidence-gathering powers that can be used effectively in aid of the American request. The Republic of France will continue to make use of those powers whenever so required under the Convention. Moreover, in the single area where the Convention leaves implementation up to the discretion of France—Article 23 concerning pre-trial discovery of documents—the Republic of France will use its compulsory powers to require production if the demand is formulated pursuant to the Convention, and meets minimum standards of relevance and specificity.

For the foregoing reasons, the decision of the lower court should be reversed, and this action remanded with instructions that demands for evidence situated in France be made in accordance with Hague Convention procedures.

ARGUMENT

POINT I

THE HAGUE CONVENTION IS THE EXCLUSIVE MEANS OF DISCOVERY IN TRANSNATIONAL LITIGATION AMONG THE CONVENTION'S SIGNATORIES UNLESS THE SOVEREIGN ON WHOSE TERRITORY DISCOVERY IS TO OCCUR CHOOSES OTHERWISE

A. The Negotiating History And Language Of The Convention Mandate Its Use

The Republic of France, the United States and the other signatory nations to the Hague Convention intended to provide a mechanism to define and ease discovery among parties engaged in international commercial activities.¹ The treaty was designed primarily to reconcile the procedural differences between common law discovery procedures, particularly those of the United States, and the systems of civil law nations in order to "improve mutual judicial co-operation in civil or commercial matters." Preamble to the Hague Convention, *reprinted in* 28 U.S.C. § 1781 (Supp. 1986).² As Secretary of State Rogers explained in his letter submitting the Convention to President Nixon:

1 See Message From the President of the United States Transmitting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. Doc. No. A, 92d Cong., 2d Sess. (1972), *reprinted in* 12 Int'l Legal Materials 323 (1973) (hereinafter cited as the "Message from the President"); Letter Of Submittal From Secretary of State William P. Rogers to the President Regarding the Evidence Convention, S. Exec. Doc. No. A.1, 92d Cong., 2d Sess. (1972), *reprinted in* 12 Int'l Legal Materials 324 (1973) (hereinafter cited as the "Rogers Letter"); Senate Comm. on Foreign Relations, Evidence Convention, S. Exec. Rep. No. 92-25, 92d Cong., 2d Sess. 1-2 (1972).

2 To a lesser extent, the Convention also harmonized conflicting notions of discovery in various common law countries. Thus, for example, discovery in the United Kingdom is not as broad as that permitted in the United States. See e.g., Wilmarth, *Lawyers and the Practice of Law in England: One American Visitor's Observation, Part II*, 14 Int'l Lawyer 171 (1980).

The substantial increase in litigation with foreign aspects arising, in part, from the unparalleled expansion of international trade and travel in recent decades had intensified the need for an effective international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad.

Rogers Letter, *supra* p. 4, at 324 (1973). In recognition of these differences, and accepting that no one system can have worldwide applicability, the drafters of the Convention sought to establish methods for discovery both "tolerable" to the authorities of the state where evidence is located, and "utilizable" in the forum where the action would be tried. See Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law, *reprinted in* 8 Int'l Legal Materials 785, 806 (1969) (hereinafter cited as the "1969 U.S. Delegation Report").³ The Convention is thus best understood as a conscious compromise negotiated between representatives of judicial systems with very different approaches to obtaining evidence for trial.

This compromise was necessary to overcome the sharp differences, and consequent conflict, between the procedural rules governing discovery in civil law nations and the United States. Indeed, absent the Convention, application of the rules usually employed in French domestic litigation would frequently stymie American discovery.

In domestic actions, French law, like the laws of most civil law jurisdictions,⁴ vests in the judge rather than the parties

3 In particular, the drafters were cognizant of and seriously concerned with addressing civil law countries' considerations of sovereignty. *Id.*; Rogers Letter, *supra* p. 4, at 324.

4 For discussions of the discovery rules of other civil law nations see, J. Merryman, *The Civil Law Tradition*, 120-131 (1969); *International Cooperation in Litigation: Europe* (H. Smit ed. 1965). See also Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigation in the United States*, 13 Int'l Law. 27 (1979) (discovery in the
(footnote continued on following page)

responsibility for the discovery of evidence. All requests by parties for the production of written evidence are made to the judge, who thereafter orders production of such evidence. Nouveau Code de Procédure Civile ("Nouv. C. Pr. Civ.") arts. 132-142 (78th ed. Petits Codes Dalloz 1986). The judge decides whether to order oral testimony by the parties, Nouv. C. Pr. Civ. arts. 184, 185, and non-party witnesses, Nouv. C. Pr. Civ. art. 222; *Enquête, Témoins, Attestations*, Encyclopédie Dalloz de Procédure Civile (1979), par. 94, and conducts the taking of such testimony, Nouv. C. Pr. Civ. arts. 184-231. Although parties and their counsel may be present when testimony is taken of other parties, Nouv. C. Pr. Civ. arts. 189, 192, or of witnesses, Nouv. C. Pr. Civ. arts. 208, 209, and may submit lists of questions to the judge to be asked orally of the parties or witnesses, the judge decides whether such questions will be asked, Nouv. C. Pr. Civ. arts. 193, 214. Direct interrogation of a party or non-party witness by the party's counsel is not permitted. Nouv. C. Pr. Civ. art. 214. See E. Blanc, *Nouveau Code de Procédure Civile Commenté dans l'Ordre des Articles* (1985) (hereinafter cited as "Blanc"), discussion under art. 193.⁵ See generally Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 Int'l Law. 35 (1979).

In contrast, discovery in the United States is managed primarily by the parties to an action. In the pre-trial stage, the judge rarely questions witnesses directly or examines documents, except to resolve disputes when party-managed discov-

United Kingdom is more narrow than that in the United States). Because there are over 350 jurisdictions in the world, O'Kane & O'Kane, *Taking Depositions Abroad: The Problems Still Remain*, 31 Fed'n Ins. Couns. Q. 343 (1981), numerous differences exist among approaches for evidence-gathering.

5 The scholarly opinions of legal commentators carry great weight in France and are highly regarded as persuasive authority in the French legal system. Decided case law is not controlling in French jurisprudence, in contrast to the principle of *stare decisis* in the United States. See generally, Amos and Walton's *Introduction to French Law* (3d ed. 1967).

ery breaks down or in connection with substantive motions. See, e.g., C. Wright and A. Miller, *Federal Practice and Procedure* §§ 2207, 2214, 2285 (1970).

The sovereignty of the Republic of France requires that the taking of evidence on French territory remain the prerogative of the French judiciary. In response to a questionnaire circulated in 1967 to participating governments prior to the Hague Conference on Private International Law, the Republic of France stated that the French conception of sovereignty and "ordre public" implies that the collection of evidence on French territory may be undertaken only by French judicial authorities. See *Réponses des Gouvernements au Questionnaire sur la Réception des Dépôts à l'Etranger*, Conférence de La Haye de Droit International Privé, IV Actes et Documents de la Onzième Session, *Obtention des Preuves à l'Etranger* 21, 33 (Bureau Permanent de la Conférence ed. 1970).⁶ Discovery requests in accordance with American rules by American litigants and, *a fortiori*, discovery orders by American courts directly to French nationals in France, undermine the sovereignty of the Republic of France by usurping the powers and duties of the French judiciary in the discovery process.

The Convention reconciles the different methods used by its signatories to gather evidence through the use of simplified procedures for letters of request,⁷ and methods for taking

6 See also Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Convention*, 37 Univ. Miami L. Rev. 733, 764 (1983) ("The term 'judicial sovereignty' implies respect for the exclusivity of governmental organs within their own territories—the monopoly of governmental power that lies at the heart of territorial sovereignty.").

7 Letters of request from the judicial authorities in one sovereign state to those in another allow the requesting state's courts to enlist the assistance of the foreign state to obtain evidence or perform some other judicial act in a judicial proceeding. Hague Convention art. 1. The Convention requires the foreign authority to "follow a request of the requesting authority that a special method or procedure be followed, unless [it] is incompatible with"

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evidence by diplomatic officers, consular agents and commissioners.⁸ These procedures provide for the involvement or consent of the sovereign on whose territory evidence is to be obtained, while obligating that sovereign to permit, or where compulsion is required to enforce, a discovery request in litigation pending in another forum.

The Republic of France strongly believes that the language and negotiating history of the Convention demonstrate that it

the internal law or procedures of the state of execution. Hague Convention art. 9. In revising its own civil procedure code to be consistent with Hague Convention procedures, France deliberately denied to its courts the right to refuse execution of letters of request on such grounds of incompatibility. See *infra* pp. 19-20. Absent a request that a special procedure be followed, the judicial authority to which the request is made "shall apply its own law as to the methods and procedures to be followed." Hague Convention art. 9. Article 10 requires the authorities in the state executing a letter of request to apply the same measures of compulsion to ensure compliance with the foreign request as are available to ensure the execution of domestic orders. The enforcement measures that may be imposed by a French judge include: ordering the disclosure and production of documents, Nouv. C. Pr. Civ. arts. 133, 139, 142; imposing a daily fine for non-compliance with an order to produce documents, Nouv. C. Pr. Civ. arts. 134, 139; ordering the personal appearance of a party or witness to testify, Nouv. C. Pr. Civ. arts. 184-186, 222, *et seq.*; drawing adverse inferences from the failure to produce evidence or appear when ordered, Nouv. C. Pr. Civ. art. 198; or assessing a fine against a person who refuses to testify when ordered, Nouv. C. Pr. Civ. art. 207.

8 Hague Convention arts. 15-17. Parties in an American litigation may obtain evidence from American parties in France by addressing themselves directly to an American diplomatic or consular official without going through French judicial channels. See *infra* pp. 24-25. Where evidence is sought from a French national or other non-American, discovery before such an official must be, and is as a matter of routine, authorized by the Civil Division of International Judicial Assistance of the Ministry of Justice. The available evidentiary procedures are virtually identical to those that may be carried out if discovery were to occur in the United States: depositions, written interrogatories, and production and inspection of documents or other physical items. Article 17 authorizes the appointment of a commissioner who has been approved by the appropriate authority in the state where discovery is to occur. If permitted by American law, a French or American lawyer could be appointed as a commissioner and conduct evidence-gathering procedures in France. Borel & Boyd, *supra* p. 6, at 42.

sets forth mandatory procedures by which evidence located abroad may alone be sought, unless the foreign sovereign permits otherwise. Article 27 provides, in pertinent part:

The provisions of the present Convention shall not prevent a Contracting State from . . .

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

The negative wording of Article 27 indicates that discovery by procedures not set forth in the Convention may occur only upon the consent of the state in which the evidence or witness is located.⁹ See also Hague Convention art. 28 (a Contracting State may ease its procedures in separate bilateral or multilateral agreements). Procedures for seeking evidence not expressly detailed by the Convention or by the laws of the state wherein evidence is sought are not permitted.¹⁰

9 The first time that the Solicitor General of the United States was asked to advise this Court of the executive branch's views on the Hague Convention, he stated that it "deals comprehensively with the methods available to United States courts and litigants to obtain proceedings abroad for taking evidence" and that "parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted." Brief for the United States as *amicus curiae* at 5-7, *Volkswagenwerk A.G. v. Falzon*, 465 U.S. 1014 (1984), reprinted in 23 Int'l Legal Materials 412, 414 (1984). But see subsequent Brief for the United States as *amicus curiae*, *Club Méditerranée S.A. v. Dorin*, 105 S. Ct. 286 (1984) (Hague Convention not exclusive) reprinted in 23 Int'l Legal Materials 1332 (1984); Brief for the United States as *amicus curiae*, *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority*, 106 S. Ct. 52 (1985) (Hague Convention not exclusive).

10 See also Heck, *U.S. Misinterpretation of the Hague Evidence Convention*, 24 Colum. J. Transnat'l L. 231 (1986) (American courts breach United States international obligations by evading mandates of Convention); Radvan, *The Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters: Several Notes Concerning its Scope, Methods and Compulsion*, 16 N.Y.U. J. Int'l L. & Pol. 1031 (1984) (American litigants

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While Article 27 prohibits a court from requesting discovery abroad by procedures not set forth in the Convention, that provision allows states in which evidence is located discretion to provide to a requesting court broader discovery procedures than those prescribed by the Convention. Philip W. Amram, official *rapporteur* of the Hague Convention and United States representative to the committee that drafted the treaty, indicated in his Report¹¹ that Article 27 was designed to permit a Contracting State to provide "broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants." Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. Doc. No. A.1, 92nd Cong., 2d Sess. (1972), reprinted in 12 Int'l Legal Materials 327, 341 (1973) (hereinafter cited as the "Explanatory Report").¹² Indeed, the negotiating history of the Conven-

must follow Convention's binding provisions); Augustine, *Obtaining International Judicial Assistance Under the Federal Rules and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters: An Exposition of the Procedures and a Practical Example: In re Westinghouse Uranium Contract Litigation*, 10 Ga. J. Int'l & Comp. L. 101 (1980) (Convention provides standardized framework replacing all previous methods for seeking evidence in transnational litigation); Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad*, 132 U. Pa. L. Rev. 1461 (1984) (minimum standards established by Convention preempt all other forms of discovery); Note, *Gathering Evidence Abroad: The Hague Evidence Convention Revisited*, 16 L. & Pol'y in Int'l Bus. 963 (1984) (same).

11 "[W]hen the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning." *Arizona v. California*, 292 U.S. 341, 359-60 (1934) (citations omitted).

12 See also Conférence de La Haye de Droit International Privé, *IV Actes et Documents de la Onzième Session, Obtention des Preuves à l'Etranger* 189 (Bureau Permanent de la Conférence ed. 1970) (a state becoming a party to the Convention has freedom to offer unilaterally to any other state, with or without reciprocity, judicial assistance wider than the minimum presented in the Convention).

tion is replete with statements that the Convention establishes minimum standards to which signatory nations must adhere, with the limited exception that a state with more liberal local law may make it available to the requesting court.¹³

Civil law nations participating in the treaty agreed to procedures for securing evidence within their borders which required their courts to use common law practices alien to them. Article 9, which "impose[s] obligations on civil law courts to take evidence 'common-law style,'"¹⁴ and Articles 15-17, which permit discovery to be conducted before a consular official or commissioner instead of a judge,¹⁵ represented large and unprecedented concessions by civil law countries to the United States' desire to have American-style discovery enforced abroad. As noted by President Nixon upon recommending the Convention to the United States Senate, "ratification of the convention will require many other countries, particularly civil law countries, to make important changes in their judicial assistance practice." Message from the President, *supra* p. 4, at 323. The Republic of France and the other civil law signatories would have had little incentive to agree to these American-style innovations unless the Convention defined and limited the scope of procedures by which American litigants seek discov-

13 See, e.g., 1969 U.S. Delegation Report, *supra* p. 5, at 808; Rogers Letter, *supra* p. 4, at 324 (1973). According to well settled principles of treaty interpretation, the meaning American negotiators have attributed to the treaty should carry great weight. See *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

14 Notes & Comments, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 Am. J. Int'l L. 104, 105 (1973).

15 Articles 15-17 introduce "into the civil law world on a limited basis the concept of taking of evidence by [private] commissioners." *Id.*, at 106. See also Explanatory Report, *supra* p. 10, at 337-9, and 1969 U.S. Delegation Report, *supra* p. 5 at 807 (the taking of evidence by commissioners or consular officials raises serious questions of intrusion on sovereignty of civil law countries).

ery abroad. See Oxman, *supra* p. 7, at 767.¹⁶ The Convention should not be interpreted as if it merely gave the United States new and unilateral privileges without imposing upon it any concomitant obligation of restraint. To the contrary, the Convention should be recognized as a carefully negotiated compromise embodying reciprocal concessions by the United States and civil law countries.

B. Under French Law, The Hague Convention Is The Exclusive Means Of Discovery In Litigation Involving Parties From Different Countries

Although both the Republic of France and the United States were original signatories to the Hague Convention, its procedures were quickly disregarded by many United States litigants, who instead sought to require French persons to submit to discovery in France based solely on American discovery rules. American lawyers practiced "legal tourism" and "fishing expeditions" in France, demanding documents and oral testimony from French citizens without regard to French procedures or the United States' international obligations. See Borel & Boyd, *supra* p. 6, at 35. In order to insure the respect of French sovereignty and to underscore the required exclusive use of the Hague Convention procedures, in 1980 France enacted Law No. 80-538, 1980 J.O., 1799, 1980 D.S.L. 285 (the "1980 Law").

Article 1-*bis* of the 1980 Law¹⁷ provides that:

16 Notwithstanding the plain language of Article 27 and the clear history of the article, some American courts have surprisingly interpreted that provision not only to permit a signatory nation to allow more liberal discovery within its borders, but also to permit an American court to order discovery abroad by methods broader than those allowed by the Convention. See, e.g., *Lasky v. Continental Products Corp.*, 569 F. Supp. 1227 (E.D. Pa. 1983). Such an interpretation renders the Convention meaningless and unjustifiably implies that the major concessions made by France and other signatories were unnecessary and useless gestures.

17 Article I of the 1980 Law prohibits communication of documents or information of an economic, technical, financial, commercial or industrial
(footnote continued on following page)

[s]ubject to any treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings.¹⁸

The 1980 Law imposes criminal penalties against persons and entities requesting or disclosing evidence by procedures not expressly permitted by the Hague Convention, other international treaties or French law. Law No. 80-538, art. 3.¹⁹ The 1980 Law provides for the imposition of significant fines on parties complying with such discovery requests, and in the case of individuals, up to six months' imprisonment, or both. Thus, in the case of corporate parties such as the petitioners, the corporation may be liable for fines and any employee who fulfills a discovery request may be subject to fines or imprisonment as well.

The principal purpose of the 1980 Law was to require observance in France of:

[t]he rules which define the procedures for obtaining evidence abroad. These procedures result from . . . the provisions of the New Code of Civil Procedure . . . and those of the Hague Convention of March 18, 1970 . . . , together with the declaration made by the French government at the time of its ratification. . . . The procedures thus defined are aimed at giving full effect to our international relations for judicial cooperation by permitting the carrying out on our territory of letters rogatory . . . , as

nature, where such communication would threaten French sovereign or security interests. It is not at issue here.

18 Reprinted and translated in Toms, *The French Response to the Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, 611 (1981).

19 *Id.* at 609 (French original), 611 (English translation).

well as the putting into effect . . . of the procedure for obtaining evidence by commissioners. . . .

Response of the Minister of Justice to Question on Article 1-bis of Law No. 80-538 in the National Assembly, 1981 J.O.-Déb. Ass. Nat. (Questions), January 26, 1981 at p. 373 (no. 35893), *reprinted and translated in Toms, supra* p. 13, at 612 (French original), 614 (English translation).²⁰

C. The Eighth Circuit's Decision Erroneously Assumes That The Discovery At Issue Will Not Infringe Upon French Sovereignty Or Violate French Law

The decision of the Eighth Circuit, which holds that an American litigant may disregard the Convention, is based on two fundamental misconceptions. First, the court relied on an artificial and untenable distinction between acts "preparatory" to compliance with a discovery order, and "actual" compliance with such an order, mistakenly concluding that "preparatory" acts do not offend French sovereignty. Second, the court erroneously assumed that the prohibitions of the 1980 Law can be waived.

The court below found that "when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention." 782 F.2d at 124. The court based this determination on an artificial distinction between matters "preparatory" to compliance with discovery orders, such as identifying documents and gathering information, and the "actual" production of documents or interrogatory answers in the United States. *Id.* at 124-125. The court concluded that because "preparatory" acts do not require foreign attorneys actually to appear in France, French sov-

²⁰ Under the French constitution, members of the French Parliament may submit written or oral questions to government ministers. Const. art. 48. See also *Règlement de l'Assemblée Nationale*, 133-139 (1982); *Règlement du Sénat*, arts. 74-82 (1982).

ereignty was not infringed and the 1980 Law was not violated. *Id.*

The Eighth Circuit's reasoning and holding misconceive the 1980 Law, defy settled notions of international law and significantly offend the sovereignty of the Republic of France. The court below erroneously assumed that the powers flowing from its *in personam* jurisdiction relieved the court of any obligation to respect the territorial integrity and sovereignty of foreign states. The theory that the jurisdiction of a court over a witness places all of the witnesses' property and information, wherever located, under the control of that court without regard to the interest of the discovered party's sovereign transgresses the most elementary notions of international comity.²¹ As one American commentator has noted: "The notion that jurisdiction to command appearance before the court 'domesticates' the witness or party for all purposes relevant to the litigation is fallacious." Oxman, *supra* p. 7, at 741.

It is a basic tenet of international law that each state has sovereignty over all activities taking place within its territory. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). A nation may not, therefore, conduct official

²¹ See Brief for the United States as *amicus curiae* at 7, n.3, *Volkswagenwerk A.G. v. Falzon*, *supra* p. 9, at 415: "The fact that a state court has personal jurisdiction over a private party . . . does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of the parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction." See also Oxman, *supra* p. 7, at 740: "The most cursory reading of *International Shoe Co. v. Washington* and its progeny should suggest the supremacy of context over rigid preconceived jurisdictional conclusions. *Shaffer v. Heitner*, which requires that the standards for establishing *in personam* jurisdiction apply even where the defendant's property is located within the forum state, is stood on its head by the proposition that *in personam* jurisdiction places all property wherever located under the control of a court that once purported to assert jurisdiction only over that property located within the state."

activities in the territory of another nation without the latter's consent. *Id.*²²

The discovery demanded by the court below clearly requires activities to be conducted on French territory, even accepting the court's contrived distinction between "preparatory" acts and the physical production in the United States of evidence. Documents must be identified, sorted and assembled in France, answers to interrogatories must be developed and sworn to based on information situated in France, and the end result must be forwarded to the United States.²³ International law requires that United States courts refrain from ordering such activities without the consent of the Republic of France.

In the instant case, no such consent has been given. To the contrary, the Republic of France has made a determination

22 This principle of sovereign equality has been described by the United Nations General Assembly as including the following elements: "(a) States are juridically equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States; (d) The territorial integrity and political independence of the State are inviolable. . . ." Declaration On Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.S. GAOR Supp. (No. 28) at 21, U.N. Doc. A/8028 (1970), *reprinted in* 9 Int'l Legal Materials 1292 (1970).

23 While the court below did not discuss whether a party who is subject to an American court's jurisdiction but is a non-resident of the United States may be ordered not only to produce documents solely pursuant to American rules, but also to appear in the United States for a deposition, the Fifth Circuit has addressed this question. In *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985), *cert. granted sub nom. Messerschmitt Bolkow Blohm GmbH v. Walker*, 106 S. Ct. 1633 (1986), the court stated that "[b]ecause the depositions will in fact be taken in the United States, they are not governed by the Hague Convention." *Id.* at 732. See also *Wilson v. Stillman & Hoag*, 121 Misc. 2d 374, 467 N.Y.S.2d 764 (Sup. Ct. N.Y.Co. 1983). This conclusion, that ordering a person to travel for a deposition from one nation to the United States does not order an activity to be conducted in the territory of that nation, elevates the geographic fiction of "preparatory acts" to an absurdity.

consistent with international law and French international obligations that, except in accordance with the Hague Convention, a person may not "communicate in writing, orally or by any other means, documents or information . . . leading to the establishment of proof with a view to foreign . . . judicial proceedings. . . ." 1980 Law art. 1-*bis*. Absent compliance with the procedures of the Hague Convention—under which all of the information sought by respondents could effectively be gathered—a French person providing such evidence is clearly subject to the 1980 Law's criminal penalties.

Moreover, contrary to the assumption implicit in the lower court's decision, the 1980 Law does not empower the executive branch of the French government to grant waivers from the law's prohibitions against transnational discovery conducted outside the Hague Convention procedures. Indeed, no mechanism for obtaining such waivers exists.²⁴ The conclusion of the Eighth Circuit that French sovereignty is not offended by the discovery order below, which mandates the violation of the 1980 Law, improperly questions the importance of that law to the Republic of France.²⁵ For a United States court to require violation of the 1980 Law, and to determine that French sovereignty is not thereby infringed, gravely offends French sovereignty.

24 The requirement that some American courts have sought to impose, under threat of sanctions, that a French witness seek a waiver of the 1980 Law is regarded by the Republic of France as a significant infringement or attempted infringement of its sovereignty and a material interference with its national interests. See e.g., *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Wilson v. Stillman & Hoag, Inc.*, 121 Misc. 2d 374, 467 N.Y.S.2d 764 (Sup. Ct. N.Y. Co. 1983). See also Jacobs, *Extraterritorial Application of Competition Laws: An English View*, 13 Int'l Law. 645 (1979). No such waiver has ever been granted despite the contrary assumption of United States courts.

25 Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964) ("[T]he concept of territorial sovereignty is so deep seated, [that] any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders.").

The Hague Convention was intended to harmonize situations, such as the instant one, where two nations have jurisdiction over a witness in a manner that recognizes both the power of the court before which the litigation is pending and the interests of the foreign witness' sovereign. The Eighth Circuit's view that the Convention does not apply to parties to an action belittles the achievement of its framers, suggesting that they deliberately declined to address the principal sources of conflict in transnational civil litigation. That view is at odds with the language of the Convention, which draws no distinction between parties and non-party witnesses. It is also directly contradicted by the negotiating history of the treaty, which demonstrates that the Convention was intended to provide a comprehensive, far-reaching solution to the evidentiary problems posed by international civil litigation. If that laudable objective is to be achieved, and if the Convention is to be rescued from irrelevance, the Eighth Circuit's order must be reversed.²⁶

POINT II

THE HAGUE CONVENTION PROCEDURES PROVIDE AMERICAN LITIGANTS WITH A FAIR AND REASONABLE OPPORTUNITY TO GATHER EVIDENCE

A. Compulsory Discovery Is Available Pursuant To Letters Of Request

1. The French government has revised its code of civil procedure to accommodate compulsory discovery pursuant to the Hague Convention

The French procedural rules described in Point I(A), *supra*, at one time precluded such basic American evidentiary procedures as direct and cross-examination of witnesses in the

²⁶ In this connection, the Republic of France naturally rejects the Eighth Circuit's conclusion that a first resort to the Hague Convention would somehow be more offensive to French sovereignty than complete disregard of the treaty.

context of letters of request to be executed in France. See, e.g., Gavalda, *Les Commissions Rogatoires Internationales en Matière Civile et Commerciale* (hereinafter cited as "Gavalda"), 53 *Revue Critique de Droit International Privé*, 15, 37 (1964). Accordingly, following ratification of the Hague Convention, the French government included a special set of provisions on international letters of request as part of a revision of the French code of civil procedure. Articles 733 through 748 of the Nouveau Code de Procédure Civile create an exception to French procedural rules in the case of foreign litigants using Hague Convention procedures,²⁷ and radically depart from traditional French rules by opening the Republic of France's borders to United States-style discovery. As one French author has put it, the new articles were adopted in order

to harmonize [French] rules of procedure with those of the main international treaties in force, especially with the provisions of the [Hague Convention] in order to establish a framework for execution of letters rogatory both "tolerable in the State of execution and utilizable by the court before which the case is being argued," and to confer, therefore, full efficiency on [French] relations of mutual international cooperation.

Chatin, *Régime des Commissions Rogatoires Internationales de Droit Privé*, 66 *Revue Critique de Droit International Privé* 611 (1977) (translation supplied) quoting from Amram, *Rapport Explicatif sur La Convention de La Haye du 18 Mars 1970 sur l'Obtention des Preuves à l'Etranger en Matière Civile ou Commerciale*. So long as foreign litigants comply with the Hague Convention, French courts will make available their coercive powers to enforce compliance with these newly adopted procedures.

As a general matter, Article 739 provides that: "The rogatory commission is executed in accordance with French law unless

²⁷ Articles 733 through 748 are translated into English in H. DeVries, N. Galston & R. Loening, *French Law—Constitution and Selective Legislation* (1986).

the foreign court has requested that a special form of procedure be followed." Article 739 adopts the text of Article 9 of the Hague Convention but deliberately denies to French courts the option, permitted under Article 9, of refusing to honor the foreign court's request if the "special procedures" are incompatible with local law. Blanc, *supra* p. 6 at discussion under art. 739. Thus, a procedure requested by an American court must ordinarily be followed.

Article 739 further provides that, upon request of a party, a full transcript or recording will be made of any oral examination. This procedure was designed to replace the previous system under which only a summary was prepared, which often turned out to be inadmissible as testimony in proceedings in countries such as the United States. See Gavaldà, *supra* p. 19, at 37. Allowing oral examinations to be transcribed was not mandated by the Convention; the provisions of the new procedural rules thus go beyond what is required by the Convention and evidence the Republic of France's good faith in promoting effective international judicial cooperation.

Article 740 provides that the parties and their counsel may, upon authorization of the French judge, question the witness directly, provided that such questions and answers are translated into French. French law thus specifically allows for both direct and cross-examination of witnesses in Hague Convention proceedings, in contrast to the usual domestic rule, see *supra* p. 6, providing that questions may only be asked by the French judge. Chatin, *supra* p. 19, at 619.²⁸ Moreover, Article 740 expressly permits counsel conducting such direct and cross-examination to be "foreign", i.e., to participate despite lack of admission to any French bar.²⁹ American litigants may

28 Although certain French courts had permitted cross-examination of witnesses pursuant to international letters of request prior to adoption of Articles 736-748, those cases were qualified as "exceptional." *Commission Rogatoire (Matière Civile)*, Encyclopédie Dalloz de Droit International, ¶ 40 (1969).

29 In this regard, French law appears to go beyond American practice, which would normally permit questioning only by a member of a United
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therefore be accompanied and represented by their American counsel in obtaining evidence pursuant to international letters of request.³⁰

The Republic of France has taken all necessary measures to insure the prompt and effective execution of international letters of request. Article 738 requires a judge to commence execution as soon as the letter of request is received. Article 742 adopts the provisions of Article 12 of the Hague Convention. Thus, execution of letters of request may not be refused solely because, under French law, the French courts would normally have exclusive jurisdiction over the subject matter, would not recognize the cause of action alleged, or would refuse to grant the relief sought. A French judge may refuse to execute international letters of request only where the request is outside his or her functions, e.g., enforcing an administrative order or providing a legal opinion, or where French sovereignty or security would be prejudiced thereby. Nouv. C. Pr. Civ. art. 743; Hague Convention art. 12.³¹

Under the revised civil procedure code, American litigants seeking compulsory discovery pursuant to Hague Convention procedures may take discovery by methods comparable to those used in the United States. Documents may be examined, interrogatory answers may be compelled, and oral examinations of witnesses may be taken although they must proceed on

States bar, and, indeed, sometimes only by a member of the bar of the state in which the examination is conducted. See e.g., Rule 2(a), General, Civil, Criminal, Admiralty & Magistrate Proceedings in the United States District Courts for the Southern and Eastern Districts of New York; N.Y. Jud. Law § 478 (Consol. 1983); Cal. Bus. & Prof. Code § 6125 (1974).

30 The French public prosecutors are responsible for insuring that the witnesses' fundamental due process rights are respected in all of the aforementioned proceedings. Nouv. C. Pr. Civ. art. 744.

31 In the eleven years since the Hague Convention entered into force in France, there have been no reported cases in which this "sovereignty or security" exception has been raised.

French soil before a French judge. There are opportunities for direct and cross-examination and no undue constraints are imposed on the scope of questioning. In deciding that compliance with the Hague Convention would "delay and frustrate the discovery process," 782 F.2d at 125, the court below simply ignored the careful and comprehensive procedures adopted by the Republic of France to insure that letters of request will result in effective discovery for foreign litigants.

2. The declaration made by the Republic of France pursuant to Article 23 does not apply to reasonably specific requests for documents having a direct and clear nexus with the subject matter of the litigation

Parties to the Hague Convention may declare that they "will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." Hague Convention art. 23. The Republic of France has made such a declaration.

In formulating its declaration under Article 23, the Republic of France intended to prohibit "legal tourism," *i.e.*, unfocused demands for documents by foreign lawyers acting without court supervision.³² See Gougenheim, *Convention sur*

³² Recent steps to curb abuses of United States discovery procedures—even in wholly domestic cases—anticipate a more active role for the trial judge in scrutinizing discovery requests. See Fed. R. Civ. P. 26(b)(1), 26(f), 26(g) and the 1983 advisory committee notes thereto. Moreover, the draft Restatement requires that

[b]efore issuing an order for production of documents, objects, or information located abroad, the court, or where authorized the agency, should scrutinize a discovery request more closely than it would scrutinize comparable requests for information located in the United States. Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, discovery (including requests for documents) may extend to any matter not privileged which is relevant to the subject matter of the action, even if the information sought would be inadmissible at trial, if it appears reasonably calculated to lead to the discovery of admissible evidence. However, the second paragraph of that Rule, added in 1983, calls for imposition by the court of limits on the extent of discovery comparable to those set out in Subsection 1(c). Given the degree of difficulty in obtaining compliance, and the amount of resistance that

(footnote continued on following page)

l'Obtention des Preuves à l'Etranger en Matière Civile et Commerciale, 96 Journal de Droit International 315, 319 (1969). As the Republic of France and the United States delegations to the Convention well understood, Article 23 was not intended to preclude American litigants from obtaining necessary evidence from abroad, but rather to prevent discovery in the nature of a "fishing expedition." See Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 Int'l Legal Materials 1417, 1421 (1978). The French declaration pursuant to Article 23 does not apply to letters of request seeking the discovery of documents, provided that the documents requested are enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation. The request must, of course, also be consistent with the Convention's general requirements regarding the nature of the requesting authority and respect for the requested state's public policy. See August 19, 1986 Letter from the Minister of Justice to the Minister of Foreign Affairs, annexed hereto as Appendix B.

The French declaration under Article 23 does not impede international judicial assistance. The curbs that it imposes on "fishing expeditions" will not result in an ineffective system of justice. As recognized by those American state courts that require discovery demands to specifically identify the evidence sought to be examined,³³ "fishing expeditions" are not essential to achieving justice even in common law systems.

In any event, the Article 23 declaration of the Republic of France does not change the treaty from a mandatory to a

has developed in foreign states to discovery demands originating in the United States, it is ordinarily reasonable to limit foreign discovery to information necessary to the action (typically, evidence not otherwise readily obtainable) and directly relevant and material.

Restatement of Foreign Relations Law of the United States (Revised) § 437[420] comment a (Tent. Draft No.7, 1986).

³³ *E.g.*, N.Y. Civ. Prac. R. 3120 (McKinney 1970).

permissive pact; the treaty contains no language permitting any such construction and evinces no such intent by its signatories.³⁴ To the contrary, Article 23 and the resulting curbs upon overseas "fishing expeditions" by a few overzealous American litigants should be recognized as a small price that the United States paid in exchange for the broad benefits conferred by the Convention on the vast majority of Americans involved in international litigation.

B. France Permits A French Party Or Witness To Comply Voluntarily With A Discovery Request Pursuant To The Hague Convention

Far more frequent and important in practice than compulsory discovery pursuant to letters of request is voluntary discovery in France pursuant to Articles 15-17 of the Hague Convention. The overwhelming majority of discovery requests by American litigants for evidence in France are satisfied willingly in accordance with procedures before consular officials and, occasionally, commissioners, and without the need for involvement by a French court or use of its coercive powers. Indeed, the United States Embassy in Paris will facilitate such requests to discover evidence and does so on a regular basis.

An information sheet prepared by the Office of American Services of the United States Embassy in Paris (the "Information Sheet"), which explains the elements of voluntary proceedings before consular officials or commissioners,³⁵ is readily available to the general public at the Embassy in Paris and has been available for years. (The current form is annexed as Appendix B hereto.) As explained therein, the United States

³⁴ Indeed, each of the signatories to the Convention, with the exception of the United States, Barbados, Israel and Czechoslovakia, exercised to some degree its right to make an Article 23 declaration.

³⁵ The Information Sheet also describes the Hague Convention procedures for use of letters of request.

court in which the action is pending initially issues an order designating any diplomatic or consular officer of the United States stationed in Paris to take evidence. Information Sheet at A6. Oral examination of American parties or witnesses may occur before such officers at the Embassy without any further steps. If evidence is sought from French nationals or other non-Americans, and in any case where a commissioner has been named pursuant to Article 17, the Civil Division of International Judicial Assistance of the Ministry of Justice (the "Civil Division") must authorize the discovery. Information Sheet at A6-7. While the Embassy will obtain authorization from the Civil Division at no charge for any party requesting it to do so, the Civil Division will also entertain requests made directly by an interested party or its counsel. Authorization is routinely granted and requests are handled in an expeditious manner; depending on the urgency of the request, authorization has been granted within one to two days. See Borel & Boyd, *supra* p. 6, at 42.³⁶

Under the declarations of the Republic of France made pursuant to Articles 16 and 17, the texts of which are reprinted in Appendix C hereto (the "Declarations"), such authorization is conditioned on the evidence being taken at the Embassy. In practice, this condition is easily satisfied since, as the Information Sheet points out, the Embassy will provide the use of a hearing room free of charge.³⁷ The Embassy itself notifies the parties and the Civil Division of the room, date and time for the oral examination.

³⁶ While the Embassy is unable to arrange for court reporters, the parties are free to make such arrangements. The Embassy will provide to litigants wishing to make such arrangements a list of qualified stenographers and, if necessary, interpreters.

³⁷ While a United States statutory fee for the presence of a consular officer will be charged if the proceeding occurs under Articles 15 or 16, this is not true if a commissioner has been appointed pursuant to Article 17. Information Sheet at A7, 9.

While the Information Sheet does not refer to requests for interrogatory answers or documents, it is the long-standing practice, approved of by both the Embassy and the Civil Division, to handle such requests in the same expeditious manner. Once a discovery request is authorized by the Civil Division, the documents or interrogatory answers are brought to the Embassy. There, a consular official supervises the packing and sealing of documents, takes the oath of the person answering the interrogatories, and arranges for the evidence to be sent by United States Armed Forces Mail to the court that issued the production order appointing the consular official or commissioner to take evidence. The United States judge then makes the documents or interrogatory answers available to the party requesting production. Under these well-settled procedures, the full panoply of American-style discovery devices are available and may promptly be obtained.³⁸

The willingness of the Republic of France to cooperate in litigation involving parties from another country is sincere. France has taken substantial measures to accommodate the interests of United States litigants, even though permitting American-style discovery is alien to domestic litigation in France. Under the Hague Convention and the subsequent implementing legislation enacted in France, United States-style discovery is available on both a compulsory and voluntary basis. The lower court's decision ignores the effect of these significant accommodations and, unless reversed, destroys the

³⁸ Appearance pursuant to Articles 16 and 17 is voluntary and, pursuant to the Declarations, non-American parties from whom discovery is sought must be informed in advance that failure to appear will not give rise to criminal proceedings in the state from which evidence is requested. However, as the Republic of France recognizes, French parties subject to a United States court's jurisdiction have a strong incentive to cooperate with American discovery requests pursuant to Articles 16 and 17; their own case could be hampered by imposition of the civil sanctions permitted under *Société Internationale v. Rogers*, 357 U.S. 197 (1958), and its progeny if they do not make good faith efforts to comply with American discovery requests, since France provides mechanisms for such discovery to occur.

principal achievement of the Hague Convention—the establishment of comprehensive methods for international judicial cooperation that respect the sovereignty of the signatory nations.

CONCLUSION

The order of the Court of Appeals should be reversed and the case remanded to the district court with instructions that demands for evidence situated in France be in accordance with Hague Convention procedures.

Respectfully submitted,

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APPENDICES

APPENDIX A

REPUBLIQUE FRANCAISE
MINISTÈRE DE LA JUSTICE
Direction des Affaires Civiles et du Sceau
13, place Vendôme
75042 Paris Cedex 01
Tel. 261.80.22

19 Aout 1986

Le Garde des Sceaux, Ministre de la Justice à
Monsieur le Ministre des Affaires Etrangères
Direction des Affaires Juridiques
37, quai d'Orsay
75007 Paris

OBJET: Application de la Convention de la Haye du 18 mars
1970 sur l'obtention des preuves à l'étranger en
matière civile ou commerciale.

Vous avez bien voulu me faire part des difficultés que
l'application de la réserve de l'article 23 soulève dans les
relations avec certains Etats parties à la Convention de la Haye
du 18 mars 1970 sur l'obtention des preuves à l'étranger en
matière civile et commerciale.

J'ai l'honneur de vous faire savoir que l'autorité centrale,
désignée conformément à l'article 2 de la Convention et qui
relève du Ministère de la Justice, ne s'oppose pas à la transmis-
sion auprès de la juridiction française compétente d'une com-
mission rogatoire qui a pour objet la procédure de "pre-trial
discovery of documents" lorsque celle-ci présente les garanties
suivantes: les documents demandés sont énumérés dans la
commission rogatoire et ont un lien direct et précis avec l'objet
du litige. Il va de soi que les conditions prévues de manière
générale par la Convention en ce qui concerne la nature de
l'Autorité réquerante et le respect de l'ordre public de l'Etat
requis doivent avoir été observées.

A2

Je vous suggère à cette occasion le dépôt par le gouvernement français auprès du gouvernement des Pays-Bas, dépositaire du traité, d'une déclaration interprétative de la précédente dans le sens indiqué ci-dessus afin d'améliorer la coopération judiciaire internationale.

Pour le Garde des Sceaux, Ministre de la Justice
Pour le Directeur des Affaires Civiles et du Sceau
Le Sous-Directeur

Christian ROEHRICH

A3

REPUBLIC OF FRANCE
MINISTRY OF JUSTICE
Office of Civil Affairs and of the Seal
13, place Vendôme
75042 Paris Cedex 01
Tel. 261.80.22

August 19, 1986

Le Garde des Sceaux, Minister of Justice
to
The Minister of Foreign Affairs
Office of Legal Affairs
37, quai d'Orsay
75007 Paris

RE: Application of the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

You have informed me of the difficulties that the application of the reservation under article 23 raises with respect to relations with certain States that are signatories of the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

I have the honor of advising you that the Central Authority designated pursuant to article 2 of the Convention, which is under the jurisdiction of the Ministry of Justice, does not object to transmission to the competent French court of a letter of request whose purpose is "pre-trial discovery of documents" so long as such letter of request presents the following assurances: the requested documents must be enumerated in the letter of request and have a direct and clear nexus with the subject matter of the litigation. It goes without saying that the conditions generally provided in the Convention regarding the nature of the requesting authority and respect for the requested State's public policy must have been observed.

I suggest on this occasion that the French government deposit with the Dutch government, the depository of the treaty, a declaration interpreting the prior one as indicated above in order to improve international judicial cooperation.

For *le Garde des Sceaux*,
Minister of Justice
For the Director of Civil Affairs
and of the Seal
The Assistant Director
Christian ROEHRICH

APPENDIX B

INFORMATION CONCERNING DEPOSITIONS AND LETTERS ROGATORY IN FRANCE

Since October 1974 The Hague Convention of 1970 on Taking of Evidence Abroad in Civil and Commercial Matters has been in force in France. Arrangements to take evidence in France for use in civil cases before courts in the United States must therefore be made in accordance with the general provisions of that Convention, and subject to certain specific provisions established by the French Government.

The Convention of 1970 provides three means by which evidence may be taken:

1. *LETTERS ROGATORY.* By letters rogatory (letters of request) from a judicial authority in the United States to the competent authority in France requesting that authority to obtain evidence or to perform some other judicial act. (Article 1-14.) Such letters of request should be addressed by the court in the United States to the Bureau de l'Entraide Judiciaire Internationale, Direction des Affaires Civiles et du Sceau, Ministère de la Justice, 13, place Vendôme, 75042 Paris, Cedex 01, France. *Letters of request must be written in French or accompanied by a translation into French.* A letter of request should specify:
 - (a) the authority requesting its execution and the authority requested to execute it (name of the court, or "the appropriate judicial authority of France");
 - (b) the names and addresses of the parties to the proceedings, and their representatives;
 - (c) the nature of the proceedings, and all necessary information pertaining to it;
 - (d) the evidence to be obtained;

- (e) the names and addresses of the persons to be examined;
- (f) the questions to be put to the witnesses or a statement of the subject matter on which they are to be examined;
- (g) the documents or other property to be inspected;
- (h) whether the evidence is to be given under oath or affirmation, and any specific form of oath that must be used;
- (i) whether any special procedure or method should be followed in taking the evidence.

In the absence of special instructions under items (b) and (i), the French court executing the letter of request will follow its own normal procedures.

The court issuing the letter of request may request to be informed of the date and place of the proceedings, and parties to the case and their representatives may be present. Judges of the requesting court may also be present at the proceedings.

There are no fees required for the execution of letter [sic] of requests; however, the French court may require reimbursement for any fees paid to experts or interpreters, or expenses incurred as a result of use of special procedures requested by the U.S. court.

2. *DEPOSITIONS BEFORE A DIPLOMATIC OR CONSULAR OFFICER.* By deposition before a diplomatic or consular officer of the United States (Articles 15 and 16 of the Convention and Title 28 United States Code, Section 2072). Depositions may only be taken by commission issued by the competent court. The commission should be issued to "any consular officer of the United States stationed at Paris, France" rather than to any specific name or title of consular officer.

American consular officers may take depositions from witnesses of American nationality on Embassy premises without

special restrictions. However, before evidence may be taken from French nationals or nationals of third countries, authorization must be obtained in advance from the Bureau de l'Entraide Judiciaire Internationale of the Ministry of Justice. The following specific provisions must be met:

- (a) the deposition must be held on the Embassy premises;
- (b) the hearing must be open to the public;
- (c) the date and time of the hearing must be notified to the Ministry of Justice in advance;
- (d) the witnesses must be summoned by written notice in French in advance of the hearing date (15 days advance notice). The written notice must include assurances that appearances are voluntary, that the witness may be represented by a lawyer, and that the parties to the case have consented to the deposition, or, if opposed, the reasons for their opposition.

The Embassy will obtain authorization from the Ministry of Justice. There is no charge for the use of the hearing room or for advance preparations. However, there is a statutory fee of \$90.00 an hour for the deposition or fraction thereof. *The estimated fee must be deposited in advance* in the form of a certified check payable to the American Embassy, Paris, France. Any balance remaining after the service has been performed will be refunded.

The Embassy is unable to provide the service of stenographers or interpreters. It is therefore necessary for the interested parties to arrange for a court stenographer to take down the testimony and transcribe it, unless the answers are of the "Yes and No" type, and space is provided on the interrogatories for the witness to write in his own brief replies. If the testimony is to be taken in any language other than English, the interested parties must arrange for a court interpreter. A list of qualified stenographers and interpreters is attached. The Embassy will not act as agent in arranging for services of stenographers and interpreters.

IMPORTANT - PLEASE NOTE:

In all cases involving witness [sic] of French nationality or third country nationality, the Embassy must have the information or documents listed below *at least 45 days before the deposition* is to be held. This timing is necessary in order to allow sufficient time to obtain authorization from the Ministry of Justice and provide the required advance notice to witnesses.

- (a) Commission to take deposition, referring to The Hague Convention, and precise information on name of court, name of judge or issuing authority, the names of parties to the case and their representatives;
- (b) The names and addresses (telephone numbers, if available) of all witnesses to be summoned;
- (c) The questions to be put to the witnesses or a statement of the subject matter on which they are to be examined;
- (d) The names of any of the parties or their representatives who plan to attend the hearings;
- (e) The name, address, and telephone number of the stenographer and interpreter who have been selected (if any);
- (f) Whether the parties to the case have consented to the deposition, and if not, the reasons for any objection which has been made;
- (g) A certified check for the estimated consular fee;
- (h) A suggested date for the hearing (if there are preferences), not less than 45 days after Embassy receives the above information;
- (i) All documents listed above must be accompanied by a translation in French, for the Ministry of Justice.

The Embassy will notify all parties planning to attend the hearing of the date set as soon as authorization has been received from the Ministry of Justice.

3. *DEPOSITIONS BEFORE A PERSON COMMISSIONED BY THE COURT*

Evidence may be taken in France by deposition before any competent person commissioned by a court in the United States. Authorization must be obtained in advance from the Bureau de l'Entraide Judiciaire Internationale of the Ministry of Justice. The hearing must be held within the Embassy property. All of the other provisions and the general procedure described above for depositions before a consular officer must be followed, except that there is no consular fee because the services of a consular officer are not required. In addition, the request for authorization from the Ministry of Justice must include:

- (a) an explanation of the reasons for choosing this method of taking evidence, taking into account the judicial costs involved; and
- (b) the criteria for designating the individual commissioned to take evidence.

The information required under (a) and (b) above must be supplied to the Embassy (along with the other information listed under 2, above) at least 45 days before the hearing will be held.

APPENDIX C

Declarations of the Republic of France
With Respect to the Hague Evidence Convention

In conformity with the provisions of Article 16, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendôme, Paris (1er), is designated as the competent authority to give permission to diplomatic officers or consular agents of a Contracting State to take the evidence, without compulsion, of persons other than nationals of that State in aid of proceedings commenced in the courts of a State which they represent.

That permission, which shall be given to each specific case and shall be accompanied by special conditions when appropriate, shall be granted under the following general conditions:

1. Evidence shall be taken only within the confines of the Embassies or Consulates;
2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings;
3. Evidence shall be taken in premises accessible to the public;
4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation into French, and that instrument shall mention:
 - a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State;
 - b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the State of origin;

c. That the parties to the trial are consenting or, if not, the grounds of their objections;

d. That in the taking of evidence the person concerned may be legally represented;

e. That a person requested to give evidence may invoke a privilege or duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.

5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.

In conformity with the provisions of Article 17, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendôme, Paris (1er), is appointed as the competent authority to give permission to persons duly appointed as commissioners to proceed, without compulsion, to take any evidence in aid of proceedings commenced in the courts of a Contracting State.

This permission, which shall be given for each specific case and shall be accompanied by special conditions when appropriate, shall be granted under the following general conditions:

1. Evidence shall be taken only within the Embassy confines;
2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings;
3. Evidence shall be taken in premises accessible to the public;
4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation in French, and that instrument shall mention:

a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State;

b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the State of origin;

c. That the parties to the trial are consenting and, if not, the grounds of their objections;

d. That in the taking of evidence the person concerned may be legally represented;

e. That a person requested to give evidence may invoke the privilege and duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.

5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.

The request for permission transmitted by the requesting authority to the Ministry of Justice shall specify:

1. The motives that led to choosing this method of taking evidence of preference to that of a Letter of Request, considering the judiciary costs incurred;

2. The criteria for appointing commissioners when the person appointed does not reside in France.

(15)
No. 85-1695

Supreme Court, U.S.

FILED

OCT 7 - 1986

JOSEPH F. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

**SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,**

Petitioners

versus

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA,**

Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

**BRIEF FOR COMPANIA GJONESA
de NAVIGACION, S.A. AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT**

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| Senate Exec. A, 92nd Cong., 2d Sess. 1972), reprinted at 12 Int'l Legal Materials 323-343 (1973) | 11, 12 |

No. 85-1695

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SOCIETE NATIONALE INDUSTRIELLE AREOSPATIALE
AND SOCIETE DE CONSTRUCTION D'AVIONS DE
TOURISM,

Petitioners

versus

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA,

Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR COMPANIA GIJONESA
de NAVIGACION, S.A. AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT

This brief of amicus curiae Compania Gijonesa de Navigacion, S.A., is presented in support of respondent, United States District Court for the Southern District of Iowa and respondents-real parties in interest Dennis Jones, John George and Rosa George. By letters previously filed with the Clerk of Court, petitioners and respondents-real parties at interest have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Amicus curiae, Compania Gijonesa de Navigacion, is a Spanish shipowning company and is the principal respondent in *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority*, No. 85-98 on the Court's docket. This Court has postponed any ruling on the *Anschuetz* petition pending the outcome of this case.

The *Anschuetz* decision, rendered by the United States Court of Appeal for the Fifth Circuit, was the first federal appellate court decision deciding the applicability of the Hague Evidence Convention¹ in federal litigation. In *Re Anschuetz & Co. GmbH*, 754 F.2d 602 (5th Cir. 1985). The rationale of the Fifth Circuit in *Anschuetz*, along with that of the same court in *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985) (No. 85-99 on this Court's docket), formed the basis of the decision of the United States Court of Appeals for the Eighth Circuit in this case. See *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir. 1986).

This case, like No. 85-98, involves the applicability and scope of the Hague Evidence Convention and the discovery provisions of the Federal Rules of Civil Procedure in obtaining discovery from a foreign, Convention state national over whom the United States District Court has *in personam* jurisdiction. The Court's decision in this case will directly affect the Court's disposition of the *Anschuetz* petition.

1. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, March 18, 1970, 23 U.S.T. 2555, T. I. A. S. 7444 (referred to in this brief as the "Hague Evidence Convention" or the "Convention").

STATEMENT

This case, like *Anschuetz* and *Messerschmitt*, involves a fact-setting repeating itself with increasing frequency. Plaintiff seeks recovery for personal injury or property damage caused in the United States by a defective product manufactured overseas. Plaintiff typically files interrogatories, requests for production of documents, and notices of depositions under the Federal Rules of Civil Procedure or the applicable state discovery rules. Usually, the persons and materials needed in response to the discovery requests are located at defendant's home office or manufacturing plant in a foreign nation. As a barrier to liberal U.S. discovery, and partially out of legitimate concerns of judicial sovereignty emanating from defendant's national government, the foreign defendant invokes the Convention, urging that its procedures are exclusive, or alternatively, a mandatory first choice, for obtaining the discovery information.

The Convention most often is invoked by foreign defendants in product liability litigation. However, the entire scope of U.S. civil and commercial litigation, from product liability litigation to complex securities, antitrust, and patent cases, often involves at least one foreign litigant and the possible invocation of the Convention.

This case is of immense importance to domestic and foreign litigants alike, as it will determine the manner and fairness by which litigants in federal and state courts conduct discovery and gather evidence for trial.

Amicus curiae, Gijonesa, the principal respondent in No. 85-98, in addition to being a third party plaintiff seeking discovery under the Federal Rules of Civil Procedure, is a foreign defendant subject to the "broad" scope of

discovery of the Federal Rules of Civil Procedure. Gijonesa submits that the plain language of the Convention and its history, along with fundamental fairness and important policy considerations, require a finding that the Hague Evidence Convention does not divest U.S. trial courts of authority to order domestic and foreign parties over whom the court has jurisdiction to submit to discovery in the United States. While each case should turn on its own facts, only rarely should litigants before U.S. courts seeking routine discovery from an opposing party be forced to proceed under the Convention.

SUMMARY OF ARGUMENT

The Hague Evidence Convention is not the exclusive method of obtaining discovery from nationals of Convention states who are party litigants over whom a U.S. court has *in personam* jurisdiction. The plain language of the Convention evidences no intent on the part of its drafters to make it the exclusive method of obtaining evidence from litigants in U.S. courts who are nationals of Convention states. Nor does the history of the Convention evidence any intent to make the Convention exclusive; its history demonstrates no intent to restrict U.S. courts from ordering foreign parties subject to their *in personam* jurisdiction to respond to discovery requests in the United States. Almost unanimously, United States courts which have considered the issue have concluded that it does not divest U.S. courts of jurisdiction to order discovery under U.S. discovery rules. Furthermore, the United States takes the position that the Convention is not exclusive.

Also, this Court should reject the alternative argument that as a matter of comity, evidence from abroad must first be sought under the Convention, regardless whether the U.S. court has jurisdiction over the party from whom

the evidence is sought. Establishment of a rule requiring use of the Convention as a first resort in all cases is inconsistent with comity, which requires a balancing of factors on a case-by-case basis. Requiring routine discovery from a foreign litigant to proceed under the Convention will seriously threaten U.S. judicial sovereignty and policy. Most routine discovery requests do not significantly intrude foreign sovereignty so as to require, as a matter of comity, first resort to the Convention. Nor do foreign "blocking statutes" require deference to the Convention. The few instances where the balancing of factors requires deference to the Convention as a matter of comity do not justify establishment of a firm rule.

The Convention should be interpreted, in accordance with its purpose, to expand and expedite, at minimal cost, the evidence available to U.S. courts and litigants. This purpose is best achieved, and deference is afforded both to the judicial sovereignty of the U.S. and the foreign nation, by deciding on a case-by-case basis whether comity requires that discovery first proceed from a foreign party litigant under the Convention. While comity does not require the Convention to be used in seeking ordinary discovery from foreign litigants over whom the Court has *in personam* jurisdiction where such evidence can be produced or taken in the United States, the Convention must be used where the evidence sought is from a non-party, or where the evidence is incapable of being taken or produced in the United States and is not voluntarily forthcoming. Such a result gives effect to the intent of the Convention and is consistent with United States concepts of jurisdiction and discovery.

ARGUMENT

I. THE HAGUE EVIDENCE CONVENTION DOES NOT DIVEST U.S. TRIAL COURTS OF THEIR JURISDICTION TO ORDER FOREIGN LITIGANTS OVER WHOM THEY HAVE *IN PERSONAM* JURISDICTION TO RESPOND TO DISCOVERY IN THE UNITED STATES

Petitioner, as well as several amici curiae, submit that the Hague Evidence Convention provides the exclusive method of obtaining evidence from a Convention signatory state. They argue that use of the Convention is not, or should not be, a function of whether a court has jurisdiction over a party, and further, should not depend on where the evidence is produced. They argue that application of the Convention is mandatory any time the evidence sought must come from within the borders of a Convention state, even if the place of production of the evidence is in the United States.²

Admittedly, the language of the Convention makes no distinction between *parties* and *non-parties*. Nor does the Convention make any distinctions concerning the place of production of evidence. However, that the Convention makes no such distinctions is irrelevant. There is no question that the Convention *may* be used in obtaining evidence

2. See Petitioner's brief, 17-23; Amicus Curiae brief of the Government of Switzerland, 11-13; Amicus Curiae brief of the Federal Republic of Germany, 5-6; Amicus Curiae brief of the Republic of France, 14-16; Amici Curiae Brief of the Motor Vehicle Manufacturers Association of the United States, Inc., et al., 7-22; Amicus Curiae brief of the Italy-America Chamber of Commerce, Inc., 7-16.

from *parties* or *non-parties*. Also, the Convention *may* be used in obtaining evidence located in a foreign signatory state regardless whether the evidence is produced in the United States or in the foreign nation. The distinction between *parties* and *non-parties*, and authority to compel discovery production in the United States from *parties* but not from a *non-party*, stems from limitations on a U.S. court's jurisdiction. Rather, the question to be decided is, given the U.S. court's jurisdiction over domestic and foreign litigants before it, whether the Convention altered this jurisdictional power. Stated otherwise, the question is whether the Convention *must* be used by litigants in U.S. courts in obtaining discovery from parties before it who are foreign nationals of Convention states.

The Eighth Circuit, in this case, and the Fifth Circuit, in *Anschuetz* and *Messerschmitt*, correctly recognized that question of jurisdiction of a U.S. court over a controversy and the parties to the controversy is inseparable from the question whether the Convention *must* be used in obtaining evidence from a Convention state litigant over whom the U.S. court has jurisdiction. Clearly, the federal courts in these three cases had jurisdiction to compel the foreign party to produce evidence in the United States.³ The language of the Convention and its history indicate that it in no way curbed the jurisdiction of U.S. courts to compel the production of evidence from foreign parties over whom the U.S. court has jurisdiction.

3. Fed. R. Civ. P. 37 provides the district court with broad discretion in compelling a party to comply with discovery requests. Indeed, this Court recently has authorized imposing sanctions where foreign parties did not comply with the district court's discovery requests. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

A. The plain language of the Convention evidences no intent to deprive U.S. courts of jurisdiction to compel production of evidence from foreign parties over whom they have *in personam* jurisdiction

Analysis of the intent of the Convention "must begin . . . with the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 470 U.S. 392, 105 S.Ct. 1338, 84 L.Ed.2d 289, 295 (1985).

The text of the Convention in no way indicates an intent to be the only method by which a party to U.S. litigation can obtain evidence from a foreign, Convention state national who is party to the same litigation. The text of the Convention evidences no intent to divest U.S. courts of their jurisdiction to compel foreign litigants before them to comply with discovery requests.

The preamble of the Convention is indicative of its intent:

The States signatory to the present Convention,

Desiring to *facilitate* the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

(emphasis supplied).⁴

The preamble demonstrates an intent to broaden, not restrict, the methods available to U.S. courts in obtaining evidence from other signatory nations.

Likewise, no other provision of the Convention indicates any intent to divest U.S. courts, or the courts of any other nation, of their control over parties over whom they have jurisdiction. Although the Convention provides three methods of obtaining evidence from other signatory nations,⁵ nothing in the Convention suggests that these three methods are the exclusive method by which courts or litigants in one nation can obtain evidence from another nation.

Nor does Chapter III, setting forth the "General Clauses," give any indication that the procedures outlined in the Convention are exclusive.⁶

4. See text of the Convention as reproduced at VII *Martindale-Hubbell Law Directory*, Part VII at 12 (1976) (hereinafter cited as *Martindale-Hubbell*.)

5. The Convention authorizes the taking of evidence by letter of request (Articles 1-14), before diplomatic officers and consular agents (Articles 15-16, 18-22) and before commissioners (Articles 17-22). *Martindale-Hubbell* at 12-13.

6. Articles 23 through 42. See *Martindale-Hubbell* at 13-14.

B. The history of the Convention demonstrates no intent to limit the authority of domestic courts in obtaining evidence from parties over whom the court has jurisdiction

This Court has also looked to the history of treaties in determining their intent. *E.g. Air France v. Saks*, 470 U.S. at —, 89 L.Ed.2d at 297.

Prior to the adoption of the Convention and its ratification by the United States, U.S. courts exercised their jurisdiction in ordering foreign parties over whom they had *in personam* jurisdiction to produce in the United States evidence or witnesses located in foreign nations. *See, e.g., Societe Internationale pour Participations Industrielles v. Rogers*, 357 U.S. 197 (1958); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 438 (S.D.N.Y. 1984); 6 White-man, *Digest of International Law* 163-64, 169-71 (1968). Nothing in the history of the Convention evidences any intent to change United States law in this regard.

The Convention's *Rapporteur*, Mr. Philip W. Amram, consistently stated in legal journal articles, both before and after the United States ratification of the Convention, that the Convention would *enlarge* and *improve* the methods for taking evidence abroad, while preserving less restrictive practices of internal law. Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 ABAJ 651 (1969); Amram, *Report on the Eleventh Session of the Hague Conference on Private International Law*, 63 Am. J. Int'l L. 521 (1969); Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 Am. J. Int'l L. 104 (1973).

The history of United States ratification of the Convention also indicates no intent to render the Convention the exclusive method from obtaining evidence from other signatory nations.

Nothing in the report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, which assisted in drafting the Convention, in any way indicated that the Convention was to restrict or limit the exercise of jurisdiction by U.S. courts, or the courts of any other nation, regarding power to order production of evidence from parties over whom the court has jurisdiction. *Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law*, reprinted in 8 Int'l Legal Materials 785 (1965). The delegation noted that ". . . the Convention is designed to set minimum standards for international assistance." *Id.* at 808. With regard to any changes required in U.S. procedure, the delegation reported that only "minor adjustments" may have to be made, and that these adjustments were more than justified by the elimination of the formal and technical barriers to obtaining evidence frequently interposed by foreign governments. *Id.* at 820. The delegation's report in no way suggests the extensive curtailment in the jurisdiction of U.S. courts that exclusivity of the Convention would entail.

Not suprisingly, the President's Letter of Transmittal emphasizes that the Convention's intent was to *facilitate* the obtaining of evidence abroad. *Senate Exec. A, 92nd Cong., 2d Sess. (1972)*, reprinted at 12 Int'l Legal Materials 323-343 (1973). While the Letter of Transmittal notes that other countries may have to make changes in their procedure to accommodate judicial assistance under the Convention, *Id.* at 323, there is no hint that the Convention changed prior United States practice or procedure.

The Report of the Secretary of State, attached to the President's Letter of Transmittal, also indicates the purpose of the Convention to eliminate barriers to procurement of evidence from foreign countries. *Id.* at 324-26. The Secretary of State concluded that the Convention required little change in United States procedures, while promoting the modernization of procedure in other states. *Id.* at 327.

The Explanatory Report on the Convention, by Mr. Amram, also attached to the Letter of Transmittal, set forth the Convention's purpose in enlarging the devices for obtaining evidence from abroad. *Id.* at 327. Nothing in the Explanatory Report in any way hints that the Convention's intent or effect is to restrict the methods available to domestic courts and litigants in obtaining evidence from foreign parties before them.

There is no indication in the history of the United States ratification of the Convention of any intent to limit the jurisdiction of U.S. courts in obtaining evidence from parties over whom they have *in personam* jurisdiction. To the contrary, the pre-adoption history of the Convention evidences an intent to expand and improve the methods of obtaining evidence from other signatory nations.

The first suggestion in the Convention's published history that some delegates considered it exclusive came during the second meeting of the Special Commission on the operation of the Hague Evidence Commission in May and June, 1985. *Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 24 Int'l Legal Materials 1668

(1985).⁷ The Report of that meeting states that the opinions of the delegates differed on this question and that no consensus could be reached. *Id.* at 1678. The Report expounded:

3. The question of exclusivity of the Convention remains in issue. Under the interpretation of certain States, the Convention is not by its terms an exclusive channel for obtaining evidence located abroad. However certain States consider the taking of evidence in their territory to be a judicial act which, in the absence of permission, will violate their sovereignty, and consequently the operation of the Convention in their territory will take on an exclusive character.

Id. The Report also concluded (in very non-mandatory fashion) that "blocking statutes" enacted by foreign governments and Article 23 declarations banning request for pre-trial discovery will discourage countries from using the Convention. *Id.* at 1679. It further concluded that use of the Convention should be encouraged. *Id.*

7. At the first meeting of the Special Commission, in June 1978, concern was expressed over the adoption by most nations of an Article 23 declaration excluding from the scope of the Convention pre-trial discovery as known in common law countries. See, *Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 17 Int'l Legal Materials 1425 (1978); *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, reprinted in 17 Int'l Legal Materials 1417 (1978). However, there is no indication in either report that the question whether the Convention is exclusive came up at this meeting.

Thus, the history of the Convention, both before and after its adoption and ratification by the United States, fails to support the argument that the Convention is the exclusive method of obtaining evidence from Convention state nationals. Rather, its history, consistent with its language, indicates an intent to expand, not restrict, the methods available in obtaining evidence.

- C. State and federal U.S. Courts almost unanimously have held that the Convention does not divest them of jurisdiction to order discovery from a party over whom they have *in personam* jurisdiction

While U.S. courts have come to differing conclusions concerning whether they *voluntarily* should first defer to the Convention before ordering production of evidence from a party over whom they have jurisdiction, they almost unanimously have agreed that they are not *required* to do so as the Convention does not divest them of jurisdiction.⁸ Also, the United States, in briefs filed with this Court in this case,⁹ in *Club Mediterranee, S.A. v. Dorin*, 105 S.Ct. 286 (1984) (mem.),¹⁰ and in *Anschuetz and Messerschmitt*, Nos. 85-98 and 85-99, respectively, posit that the Convention does not divest U.S. courts of jurisdiction to order the production of discovery from parties over whom they have jurisdiction.¹¹

8. See Amicus Curiae brief of the United States, 8-9 and n.7.

9. Amicus Curiae Brief of the United States, pp. 8-9.

10. Brief of the United States as Amicus Curiae, *Club Mediterranee, S.A. v. Dorin*, 469 U.S. 1019 (1984), reprinted in 23 Int'l Legal Materials 1332 (1984).

11. Brief of the United States as Amicus Curiae, *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority and Messerschmitt Bolkow Blohm, GmbH v. Walker*, Nos. 85-98 and 85-99, pp. 8-11.

The position of the Courts and the United States government is consistent with the plain language and the history of the Convention, which in no way suggests that the Convention limits the jurisdiction of courts in the United States.¹² This position taken by the courts and the United States weighs heavily against mandatory application of the Convention.¹³

II. THIS COURT SHOULD NOT ESTABLISH A HARD AND FAST RULE, AS A MATTER OF COMITY, THAT THE CONVENTION MUST FIRST BE USED IN SEEKING EVIDENCE FROM A FOREIGN PARTY OVER WHOM THE COURT HAS JURISDICTION

Petitioner¹⁴ and some amici curiae¹⁵ argue that this Court, as a matter of comity, should require U.S. courts to first resort to the Convention before compelling discovery from a party under U.S. discovery rules.

Such a hard and fast rule is unwise and is inconsistent with comity. Comity does not require deference to the Convention except in rare circumstances where the evidence gathering process seriously infringes on the sovereignty of the foreign nation. Serious policy considerations dictate

12. See Argument No. I, pp. 6-16, *supra*.

13. Additionally, the United Kingdom takes the position that the Convention is not exclusive. See Amicus Curiae Brief of the United Kingdom, 4-6.

14. Brief of Petitioner, 23 *ff*.

15. Brief of amici curiae *Anschuetz & Co. GmbH and Messerschmitt-Bolkow-Blohm GmbH*, 14-29; Amicus Curiae Brief of the United Kingdom, 6-19.

against *always* requiring as a matter of comity deference to the Convention in obtaining evidence from foreign Convention state litigants.

A. Establishment of a concrete rule *requiring* deference to the Convention in obtaining evidence from Convention state litigants is inconsistent with comity considerations

This Court should not require, as a matter of comity, U.S. courts and litigants to, in every case, first seek discovery from Convention state litigants under the Convention. Adoption of such a hard and fast rule implies a serious conflict of sovereign interests in every situation where such evidence is sought from a Convention state national. Civil and commercial litigation involving foreign litigants, and the procurement of evidence from these litigants, is common and rarely presents a substantial threat to the sovereignty of the foreign nation. See *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, appended to *Letter of Transmittal*, reproduced at 12 Int'l Legal Materials 327 (1973).

In *Hilton v. Guyot*, 159 U.S. 113, 164-66 (1895) this Court found that comity considerations necessarily fluctuate with the facts of each case. Application of principles of comity is *and must be* uncertain: "... it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule." *Id.* at 164 quoting from *Saul v. His Creditors*, 5 Mart. N.S. 569, 596, 16 Am.

Dec. 212 (La. 1827).¹⁶ Comity is voluntary and is an imperfect obligation, the extent and boundaries of which each nation must judge for itself. *Hilton v. Guyot*, 159 U.S. at 165. This Court's most recent decisions confirm that comity is insusceptible to a single, rigid and inflexible set of boundaries applicable to all cases. See *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); see also *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197 (1958).

Rather than the establishment of a concrete rule, comity requires balancing various factors, individual to each case, in determining *in that case* the extent to which deference should be given to a foreign law or procedure. While comity considerations necessarily vary case by case, comity always involves a balancing of competing interests, that is: (1) the extent to which recognition of the foreign law intrudes on U.S. sovereignty; (2) the extent to which application of the U.S. law would intrude on foreign sovereignty; and, as a function of balancing (1) and (2); (3) the interest of the U.S. in applying its own law and the extent to which the foreign interest can be reconciled with U.S. interests in establishing a rule applicable to the case before the Court. See *First National City Bank*, 462 U.S. at 626-634; *Sabbatino*, 376 U.S. at 408-12; *Societe*, 357 U.S. at 208-213; *Guyot*, 159 U.S. 164-65. Affecting the balancing of factors is the underlying principle that a foreign entity which seeks the benefits of doing business in the United States must

16. "Comity of nations" has been defined as "[t]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." *Black's Law Dictionary* at 242 (5th ed. 1979).

also accept the responsibilities that go along with the privilege. *First National City Bank*, 462 U.S. at 632.

B. Comity does not ordinarily require U.S. courts to defer to the Convention with regard to routine discovery requests from a foreign Convention state litigant

In determining whether comity requires deference to the sovereignty of a foreign nation, and in determining the extent of deference required, each case must turn on its own facts. Nevertheless, comity should rarely require routine discovery requests, as are sought in this case, in *Anschuetz*, and in *Messerschmitt*, to proceed under the Convention in the first instance. Any rule requiring deference to the Convention with regard to routine discovery from Convention state litigants will seriously threaten U.S. judicial sovereignty and policy. The minimal infringement of most U.S. discovery requests on the sovereignty of other nations does not outweigh the serious inroads into U.S. judicial sovereignty that routine deference to the Convention will make.

1. Requiring application of the Hague Evidence Convention to routine discovery requests from Convention state litigants seriously threatens U.S. judicial sovereignty and policy

Plaintiffs in this case, pursuant to the Federal Rules of Civil Procedure, propounded interrogatories, requests for productions of documents and requests for admissions requiring responses and documents to be produced in the United States by *Aerospatiale*, a party over whom the court has *in personam* jurisdiction. *Anschuetz* and *Messerschmitt* additionally involve production for deposition in the United States, witnesses over whom the foreign parties have control.

A rule requiring initial deference to the Convention will seriously threaten United States judicial sovereignty and will seriously erode the United States policy of full and fair discovery at a minimum of cost to the litigants.

Such a rule would make foreign courts the arbiters of the extent of information produced and the manner in which such information is produced, seriously eroding United States judicial sovereignty. *In re Anschuetz*, 754 F.2d 602, 610-11 (5th Cir. 1985); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 446 n. 18 (S.D.N.Y. 1984) quoting *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 522 (N.D.Ill. 1984). Under Article 23 of the Convention, signatory states are free to make a declaration that they will not honor requests for pre-trial discovery as known in common law countries. See *Martindale-Hubbell* at 13. Of the seventeen nations which are parties to the Convention, all but four have made a reservation limiting or prohibiting the use of the Convention in obtaining pre-trial discovery. *Id.* at 15-21. Both France and the Federal Republic of Germany (FRG) presently have in effect declarations under Article 23, which, on their face, totally prohibiting use of the Convention within their borders to obtain pre-trial discovery. *Id.*

Despite their Article 23 reservations, France and the FRG have declared that discovery can be obtained relatively easily from their respective countries. U.S. litigants, however, have described their experiences to the contrary. The United States notes in its amicus curiae brief that substantial foreign litigation concerning the appropriateness of its discovery request has resulted when it attempted to use the Convention, all with no guarantee that the information sought will ever be produced. See Amicus Curiae Brief of the United States, 16-18.

An American attorney similarly described his experiences with the Convention. Platto, *Taking Evidence Abroad for Use in Civil cases in the United States—A Practical Guide*, 16 Int'l Law. 575 (1982). Platto's attempt to gather evidence in the FRG involved several months of litigation in FRG courts, in addition to review by the FRG Ministry of Justice. The end result of his sojourn through the FRG legal system was that no documents were produced, although examination of witnesses was allowed. *Id.* at 581-85. Platto advises U.S. litigants to avoid use of the Convention if discovery is possible under the Federal Rules of Civil Procedure. *Id.* at 576.¹⁷

Also inherent in the Convention procedure is substantial expense and delay. The United States indicates that its experience in France costs over \$40,000 in foreign counsel fees and two and one-half years in litigation without production of the requested testimony. *See* Amicus Curiae Brief of the United States, 16-18. Similarly, its experiences in Italy and the United Kingdom resulted in substantial expense and delay and less than satisfactory results. *Id.* Similarly, Platto describes the expense and delay associated with his use of the Convention in obtaining evidence from the United Kingdom and the FRG. Platto recommends the expense of using foreign counsel to guide the U.S. litigant through the technicalities of foreign procedure under

17. Platto notes that the "trick" to obtaining evidence under the Convention is to avoid use of the term "discovery," rather requesting only trial evidence. Platto, 16 Int'l Law. at 577.

the Convention. Platto, 16 Int'l Law. at 578, 580-81, 582 ff.¹⁸

The Convention mechanism, by virtue of the authority and discretion it vests with the courts and other authorities in the foreign state from which the evidence is sought, if required to be used, necessarily divests the U.S. court of substantial control over litigation and its jurisdiction over parties to the litigation. The fair administration of justice in the United States is dependent on development of the case by the parties through discovery. The resulting delays and the expense to litigants in seeking routine discovery under the Convention may threaten the ability of parties to obtain foreign discovery, thus placing the foreign litigant from whom evidence is sought, at a substantial advantage. With regard to most routine discovery, requiring deference to the Convention will substantially intrude on the judicial sovereignty of the United States. Comity does not require such an intrusion except in rare instances where the foreign interests substantially outweigh the interests of the U.S. court.

2. Routine discovery requests directed at foreign Convention state litigants rarely intrude on foreign sovereignty so as to require first resort to the Convention

Petitioner and several amici curiae submit any gathering of evidence located within a foreign nation's borders infringes on the foreign nation's judicial sovereignty unless

18. Interestingly, both the United States and Platto note that their experiences under the Convention were during attempts to obtain information from parties not involved in the U.S. litigation, and thus, from parties over whom the U.S. court had no jurisdiction. Thus, the evidence was not available except under the Convention.

the evidence is gathered pursuant to a procedure, such as the Convention, ratified by the foreign nation.¹⁹

Initially, whether routine discovery orders and requests requiring production in the United States of witnesses or information over which a litigant has control, infringe upon a foreign nation's sovereignty is subject to serious question. Such discovery does not require the presence of American attorneys on foreign soil, nor does it require the party from whom the evidence is sought to engage in any conduct within the borders of the foreign nation traditionally considered a judicial act. See *Anschuetz*, 754 F.2d at 611 quoting from *Graco*, 101 F.R.D. at 521 and quoting from *Adidas (Canada) Ltd. v. S/S SEATRAN BENNINGTON*, 80 Civ. 1911 (S.D.N.Y. May 30, 1984). Routine discovery requests, requiring the gathering of documents or information, or the designation of witnesses in the foreign nation to be produced in the United States should not be considered judicial acts affronting the sovereignty of the foreign nation. *Anschuetz*, 754 F.2d at 611-12. Indeed, the foreign litigant performs essentially the same evidence gathering acts in preparation of its case before the U.S. court. It has not been suggested that the foreign party's preparation of its case in the foreign nation for presentation in the United States involves violation of the foreign nation's sovereignty. *Id.*, 754 F.2d at 611-12.

There are, no doubt, discovery demands seriously affronting to the judicial sovereignty of the foreign nation. For example, should the discovery request involve military

19. Petitioner's brief, 21-22, 24-25, 27-28; Amicus curiae brief of France, 14-17; Amicus curiae brief of Germany, 13-17; Amicus curiae brief of Switzerland, 8-11; *Anschuetz* amicus curiae brief, 8-13; Motor Vehicle amicus curiae brief, 9-10, 15.

or foreign policy information, the balance of comity interests may weigh in favor of requiring discovery to proceed under the Convention. Likewise, when the discovery must actually take place on foreign soil, such as a request for inspection of foreign property, the foreign government's interest in protecting its sovereignty is significant and may outweigh concerns of U.S. judicial sovereignty. In such circumstances, comity may require discovery to proceed under the Convention. See *Anschuetz*, 754 F.2d at 606, 608-09 explaining *Volkswagenwerk, A.G. v. Superior Court*, 123 Cal.App.3d 840, 176 Cal.Reptr. 874 (1981) and *Pierburg GmbH & Co. v. Superior Court*, 137 Cal.App.3d 238, 186 Cal.Reptr. 876 (1982). However, routine discovery requests, involving no invasion of foreign soil by American attorneys and requesting only civil or commercial information, generally involve minimal, if any, affront to the judicial sovereignty of the foreign nation. Under ordinary circumstances, this "invasion" of a foreign nation's sovereignty is non-existent or minimal and does not outweigh the judicial sovereignty of the U.S. court in compelling discovery in the United States under its domestic rules. The foreign entity, reaping the benefit of its activity in the United States, should not be able to hide behind its foreign status as to every discovery request. Absent special circumstances, discovery demands on the foreign litigant should proceed under the Federal Rules of Civil Procedure, or the applicable state rules, on equal footing with discovery demands from domestic litigants.

Likewise, foreign "blocking statutes," do not require U.S. courts to defer to the Convention with regard to routine discovery requests. This Court, in *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197 (1958) held that foreign laws prohibiting the production of discovery information provide no barrier to the imposition of sanctions for failure to comply with discovery orders

issued under the Federal Rules of Civil Procedure. More recently, this Court has affirmed the imposition of sanctions against foreign litigants who refused to comply with a district court's discovery order. See *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694 (1982).

While "blocking statutes" may demonstrate foreign nations' concern for protecting their sovereignty, they should not, by themselves, excuse litigants from complying with routine discovery requests under the Federal Rules of Civil Procedure. The Convention does not divest a domestic court of its jurisdiction to compel parties before it to comply with requests for evidence. See Argument No. I, *supra*. Likewise, a foreign nation should not be able to unilaterally divest U.S. courts of such jurisdiction by passage of a "blocking statute." Unless the foreign nation's interest, irrespective of a "blocking statute," outbalances the United States judicial sovereignty and United States interest in controlling discovery from all litigants before it, including foreign litigants, the U.S. court should be free to compel discovery by threatening or imposing sanctions within the limitations of United States discovery rules and this Court's decisions in *Societe* and *Insurance Corp. of Ireland*.

III. A CASE-BY-CASE BALANCING OF COMITY INTERESTS BEST INSURES PROTECTION OF U.S. JUDICIAL SOVEREIGNTY WHILE AFFORDING DEFERENCE TO CONVENTION PROCEDURES AND FOREIGN JUDICIAL SOVEREIGNTY

Requiring U.S. litigants, in all cases, to first seek discovery from foreign litigants under the Convention renders United States judicial sovereignty and United States discovery policy subservient to the judicial sovereignty of foreign nations. Litigants who are nationals of Convention states will have a substantial advantage in U.S. litigation. While U.S. parties and foreign parties who are not nationals of a Convention state will be subject to the full scope of discovery under liberal U.S. discovery rules, litigants who are nationals of Convention nations will be able to invoke the Convention, leaving the scope of available discovery within discretion of the foreign national's own government. Foreign governments would be free, under their Article 23 declaration, to decline to provide "pre-trial" discovery to the U.S. litigant. This would encourage concealment of discovery materials outside the U.S., and possibly encourage U.S. businesses to establish foreign subsidiaries for the purpose of concealing documents. See *Cooper Industries, Inc. v. British Aerospace*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984). "It does not require a Prometheus to foresee that United States litigants would soon find it impossible to obtain necessary discovery from foreign based parties." *Anschuetz*, 754 F.2d at 614.

On the other hand, a holding that discovery from foreign Convention state litigants should never first proceed under the Convention totally disregards legitimate concerns of foreign governments regarding violation of their judicial sovereignty by U.S. litigants.

This Court should adopt a balancing approach to application of the Convention, such as is set forth by the Fifth Circuit in *Anshuetz* and *Messerschmitt*. Whenever discovery is sought from a litigant who is a Convention state national, the judicial sovereignty of the U.S. court, its interest in assuring that all litigants are treated fairly and equally, and its interest in maintaining control over discovery and the litigation generally, must be weighed against any intrusion to the judicial sovereignty of the foreign nation. With regard to routine discovery from a foreign litigant before the U.S. court, such as interrogatories, requests for documents, and depositions of litigant-controlled witnesses, involving no intrusion of American attorneys on foreign soil, the interest of the U.S. court in proceeding under its own discovery procedures ordinarily will outweigh any minimal intrusion of the judicial sovereignty of the foreign nation. Where the discovery requests are more intrusive of the foreign nation's judicial sovereignty, such as where the requests require a property inspection in the territory of the foreign state, or where the discovery touches on state or military secrets, the foreign interests may outweigh U.S. concerns, requiring that discovery first proceed under the Convention, *even though the U.S. court has jurisdiction over the party from whom discovery is sought*. Where the U.S. court has no jurisdiction over the party, such as in the case of an independent witness, and the party will not willingly submit to discovery, the U.S. court and its litigants may have no choice but to proceed pursuant to the Convention.

Only by balancing the interests, taking into consideration the peculiar factors presented in each case, can effect be given to the purpose of the Convention in easing access to foreign evidence, while giving deference both to the legitimate jurisdictional concerns of the United States court and the foreign nation.

CONCLUSION

Gijonesa submits that this Court should reject the contention that the Hague Evidence Convention provides the exclusive method of obtaining evidence from a national of a Convention signatory state who is a party over whom a U.S. court has *in personam* jurisdiction. This Court should also reject the contention that comity always requires the U.S. court to defer to the Convention in seeking evidence from a national of a Convention signatory state. Rather, the Court should adopt a case-by-case balancing approach in accordance with the principles discussed above. Based on these principles, the Court should affirm the result reached by the Eighth Circuit.

Respectfully submitted,

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